
**United States Circuit Court
of Appeals**
For the Ninth Circuit

MAX WOLF
Plaintiff in Error

vs.

J. M. EDMUNSON and M. J. EDMUNSON
Defendants in Error

Transcript of Record

Upon Writ of Error to the District Court of the
United States for the District of Oregon

Filed

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Clerk.

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**In the District Court of the United States
For the District of Oregon**

MAX WOLF,

Plaintiff,

vs.

J. M. EDMUNSON AND M. J. EDMUNSON,

Defendants.

MARCH TERM, 1915

Be it remembered, that on the 19th day of June, 1915, there was duly filed in the District Court of the United States for the District of Oregon a complaint by the plaintiff herein, and a summons was duly issued thereon and placed in the hands of the United States Marshal for service, and the same was duly returned and filed on the 23rd day of June, 1915, with the endorsement of said Marshal thereon, showing due service upon each of the defendants herein on the 21st day of June, 1915; that thereafter on the 13th day of September, 1915, plaintiff filed his amended complaint herein in words and figures as follows, to-wit:

COMPLAINT

(Title omitted.)

Plaintiff, for cause of action, in his amended complaint, alleges the following facts:

1. That Max Wolf is a citizen of the City and County of San Francisco, California, and is residing therein.

2. That the defendants, J. M. Edmunson and M. J. Edmunson are citizens of Lane County, Oregon, and are both residing therein.

3. That Marcus J. Netter and Max Wolf were and at all times alleged herein partners doing business under the firm name and style of Klaber, Wolf & Netter.

4. That on the 29th day of May, 1912, the said firm of Klaber, Wolf & Netter and the defendants entered into a written contract whereby the defendants agreed to sell and the said firm of Klaber, Wolf & Netter agreed to buy thirty thousand (30,000) pounds of hops, net weight, of the crop of hops to be grown in the year 1912 by the defendants on the farm owned by Mrs. M. J. Edmunson, and known as the Edmunson farm, situate about one mile east of Goshen, in the County of Lane and State of Oregon, and consisting of one hundred acres, and upon which land there was under cultivation thirty acres, more or less, of hops.

5. That the defendants agreed to cultivate, carefully spray, cleanly pick, properly dry, cure and bale and prepare for market all of the said hops grown on the said premises in a good and husbandlike manner.

6. That it was provided in said contract, that all of said hops were to be of first quality, that is, sound condition, good and even color, fully matured, but not over-ript, flakey, cleanly picked, properly dried and cured, free from sweepings and other for-

eign matter, and not affected by spraying or vermin damage, and should not be the product of a first year's planting.

7. That the said Klaber, Wolf & Netter agreed to pay to the defendants at the rate of twenty-five cents per pound for the said hops when delivered in accordance with the terms of said agreement. That said hops were to be delivered to the said Klaber, Wolf & Netter free from all liens or encumbrances of whatsoever kind and nature, on the cars or in the warehouse at Goshen, Oregon, between October 1st, 1912, and October 31st, 1912.

8. It was further agreed that said Klaber, Wolf & Netter should advance under the said contract, as part payment for the said hops, the sum of \$1,200.00 on or about May 31st, 1912, and \$1,800.00 on or about September 1st, 1912, that pursuant to the said contract the said Klaber, Wolf & Netter did on the 1st day of May, 1912, advance to the said defendants the sum of \$1,200.00, and on the 31st day of August, 1912, did advance the said sum of \$1,800.00, as said part payment on said hops.

9. And it was further agreed that if in the indement of said Klaber, Wolf & Netter the quality of all or of any portion of the hops tendered under the said contract by said defendants should be inferior from any cause whatever, to the quality of hops specified in said agreement, it should be the duty of the defendants to tender to the said Klaber, Wolf & Netter the said hops raised, and the said Klaber,

Wolf & Netter might have the right of accepting the entire quantity contracted for or any portion less than the entire quantity contracted for a reduction in price, which reduction should be equal to the difference in the market value of the said hops tendered under the contract and the market value of such hops at the time of the execution of the contract.

10. That during the month of October, 1912, the said Klaber, Wolf & Netter received samples from the hops grown upon the said premises during the said year 1912, and finding them of inferior quality and not according to the specifications contained in the said contract, said Klaber, Wolf & Netter, on the 30th day of October, 1912, inspected the said hops fully and completely and found them slack dried, bad and uneven in color, of unsound condition, not fully matured, not cleanly picked, not properly dried or cured, and affected by vermin damage, whereupon the said Klaber, Wolf & Netter rejected the said hops as first quality hops as defined by said contract and said defendants refused to tender the said hops to the said Klaber, Wolf & Netter at any reduction in price, but refused to act any further under the said contract or comply with any of the terms or provisions thereof, and said defendants, without the knowledge or consent of said Klaber, Wolf & Netter, proceeded to and did sell the said hops to other parties in violation of their said contract.

Paragraph 11 stricken out by the Court.

Paragraph 12 stricken out by the Court.

13. That the defendants have failed, neglected and refused to repay the said sums aforesaid advanced to the defendant, but did not refuse to repay the same until after they had sold said hops, that the said sums became due upon the 30th day of October, 1912, with interest thereon from the date of said advances, and said Klaber, Wolf & Netter had demanded repayment thereof.

Paragraph 14 stricken out by the Court.

15. That the consideration for entering into the said contract between said Klaber, Wolf & Netter and defendants was the sum of One (\$1.00) Dollar, the receipt whereof was acknowledged by the said defendants in said contract.

Paragraph 16 stricken out by the Court.

Paragraph 17 stricken out by the Court.

18. That the said Marcus J. Netter is deceased, and his said last will and testament was duly admitted to probate in the Probate Court of the State of California in and for the City and County of San Francisco, of which state and county he was a citizen and resided therein, and all the right, title and interest that the said Marcus J. Netter had in and to the aforesaid claim against the defendants, was on the 28th day of February, 1914, duly assigned and transferred to this plaintiff, who is now the sole owner and holder of the said claims, as surviving

partner and for the purpose of distributing the proceeds thereof.

19. That by reason of the foregoing facts the defendants are indebted to plaintiff in the sum of \$1.00, the consideration for the said contract; \$1,200.00 with interest thereon from May 1st, 1912; \$1,800.00 with interest thereon from August 31st, 1912.

Wherefore, plaintiff demands judgment against said defendants for the sum of \$1.00; for the sum of \$1,200.00, with interest thereon from the 1st day of May, 1912; \$1,800.00, with interest from Aug. 31st, 1912; each at the rate of six per cent per annum, and for his costs and disbursements of action herein.

WILLIAMS & BEAN,
Attorneys for Plaintiff.

Verification omitted.

Said amended complaint contained an acknowledgment of service endorsed thereon by A. C. Woodcock, one of the attorneys for defendants.

That thereafter, on the 31st day of January, 1916, defendants filed their amended answer herein, in words and figures as follows, to-wit:

ANSWER

Title omitted.

Come now the defendants in the above entitled action, and by leave of the Court first had and obtained, file this their amended answer to the plain-

tiff's amended complaint, and admit, deny and allege as follows:

I.

The defendants admit paragraphs 1, 2, 3, 4, 5, 6, 7, 8, of said amended complaint.

II.

The defendants admit that the contract provided the provisions set out in paragraph 9 of said amended complaint.

III.

As to paragraph 10 of the amended complaint, these defendants deny that during the month of October, 1912, the said Klaber, Wolf & Netter received samples of the hops grown upon said premises during the said year of 1912, and finding them of inferior quality, or not of the specifications contained in said contract; said Klaber, Wolf & Netter, on the 30th day of October, 1912, inspected the hops fully or completely or found them slack dried, or at all, or uneven in color, or of unsound condition, or not fully matured, or not cleanly picked, or not properly dried or cured, or affected by vermin damage.

IV.

These defendants admit that the said Klaber, Wolf & Netter, through their representative, rejected said hops, and deny that the reason for the same was that they were not first quality hops as defined by the contract, and these defendants deny that they refused to tender the said hops to the said Klaber, Wolf & Netter at any reduction in price, or refused

to go any further under the said contract, or to comply with any of the terms and conditions thereof, or that said defendants, without the knowledge or consent of said Klaber, Wolf & Netter, proceeded to and did sell the said hops to other parties in violation of their said contract, or otherwise, except as hereinafter alleged.

V.

That these defendants deny all the allegations set forth in paragraph 14 of said amended complaint, except as hereinafter set forth.

VI.

In reference to paragraph 18 of said amended complaint, these defendants allege that they have no knowledge or information sufficient to form a belief as to whether or not the said Marcus J. Netter is deceased, or that his last will or testament was duly admitted to probate in the Probate Court of the State of California, in and for the City and County of San Francisco, or that he was a citizen of such state and county and resided therein, or that all the right, title and interest that the said Marcus J. Netter in said claim against the defendants was on the . . . day of . . . , 1914, duly or at all assigned or transferred to the plaintiff, or that the plaintiff is now the owner or holder of said claim.

VII.

As to paragraph 19, these defendants deny that for any reason the defendants are indebted to plaintiff in the sum of One Dollar for the consideration

for the said contract, or \$1,200.00 and interest thereon from May 1st, 1912, or in any sum, or for \$1,800.00 and interest thereon from August 31st, 1912, or for any sum.

VIII.

These defendants admit that on the 29th day of May, 1912, the firm of Klaber, Wolf & Netter and the defendants entered into a written contract for the purchase by the said firm and the sale by the said defendants of hops to be raised on the lands described in the contract, a copy of which contract is hereunto annexed, and for greater certainty made a part of this answer.

That after the execution of said contract the defendants proceeded in a careful manner to cultivate the hops on the lands described in said contract, and proceeded to pick said hops and bale the same in a husbandlike manner, and the defendants did everything that could be done under the circumstances.

That the defendants did everything necessary to be done to cure said hops and bale the same ready for market.

IX.

The defendants admit that the firm of Klaber, Wolf & Netter advanced the money alleged to have been advanced.

That the contract price of said hops was twenty-five (25) cents per pound.

That at the time said hops were ready to be delivered to the purchasers, the price had gone down

at least ten (10) cents per pound below the contract price.

X.

That the said purchasers proceeded as hereinafter alleged to abandon said contract in various ways and ignore the same and endeavored to violate the contract absolutely in this: that on or about the 5th day of October, 1912, the purchasers, through their agents, made a pretended inspection of said hops.

That the defendants had raised on said yard about forty thousand (40,000) pounds of hops, all of which were stored in the warehouse in Goshen, Oregon, as specified in said contract, and the said purchasers, in making their first inspection of said hops, took out only two samples from two bales, and did not examine any of the rest of said hops in said warehouse, and at that time the said purchasers notified the defendants that they had rejected the hops and would not take them in under any conditions whatever, and requested the defendants to sell the hops to other parties.

That condition of affairs existed until the 31st day of October, 1912, being the date mentioned in the contract when the contract was to expire, then the said purchasers, carrying out their pretense, and acting in bad faith, made another pretended inspection of said hops and again notified the defendants that they rejected the whole of the hops and would not take them under any conditions whatever.

These defendants allege the facts to be, that they

have complied with all the terms and conditions of the contract entered into between them and the said purchasers, and allege the facts to be as herein alleged that the said purchasers never at any time acted in good faith and endeavored, attempted and did abandon their contract on the sole ground that the market price of hops was much lower than the contract price of hops mentioned in the contract, and these defendants further allege that they had enough hops of the quality required under the contract to fulfill the contract, and that the defendants were at all times ready and able to deliver said hops to the said purchasers and were willing to do so at any time during the life of said contract if the said purchasers had not refused to take said hops, and referring to the allegation in the complaint that the defendants sold the hops and shipped them out of the State of Oregon, the defendants allege that the hops were not sold until March, 1913, and were held in the warehouse until that time without any incumbrance whatever, except as the purchasers might have claimed as the purchasers at all times well knew.

XI.

That all the hops referred to herein were raised on the premises described in the contract.

Defendants, for a further and separate answer and defense to plaintiff's amended complaint, and by way of counter-claim thereto, allege as follows:

I.

That on the 29th day of May, 1912, the defendants entered into a written contract with Klaber, Wolf & Netter for the purchase by them and the raising, cultivating and production of 30,000 pounds of hops on defendants' farm in the year 1912, and the sale of said hops by the defendants to said partnership, said hops to be raised on the lands described in the contract, a copy of which is hereunto annexed, marked Exhibit "A," and for greater certainty made a part of this amended answer, which contract is the same contract mentioned in the complaint.

II.

That the defendants, in the year 1912, raised on said yard about 40,000 pounds of hops, all of which were picked, dried and baled according to the terms of said contract and stored in the warehouse in Goshen, Oregon, on and between the 1st and the 31st day of October, 1912, and the defendants tendered said hops to said partnership on and between said dates at said place, and defendants allege that said hops contained more than 30,000 pounds of hops of the quality described in said contract. That said partnership pretended to inspect and examine said hops on or about the 3rd day of October, 1912, but they inspected only two bales thereof and did not examine any of the rest of said hops in said warehouse, and at that time the said partnership notified the defendants that they had rejected the hops and would not take them under any condition whatso-

ever and requested defendants to sell said hops to other parties, and thereupon said partnership, without any right and against the terms of said contract, demanded of the defendants the repayment of the advances made for the cultivation and picking of said hops.

III.

That said partnership made no further inspection of said hops until on or about the 31st day of October, 1912, when said partnership, not acting in good faith but merely pretending to inspect said hops, examined the same and wrongfully notified defendants that they rejected all of the hops so grown by the defendants and notified defendants that they would not take them under any conditions whatsoever and again demanded of the defendants the repayment of the said advances.

IV.

Defendants allege that they have complied with all the terms and conditions of the said contract entered into between them and the said partnership and that the said purchasers never at any time acted in good faith in the inspection and examination of said hops, but at all times intended to and did abandon their said contract for the sole reason that the market price of hops at the time of said tender and inspection was about sixteen (16c) cents per pound for the quality of hops described in said contract, whereas the contract price therefor, agreed to be paid by said partnership to the defendants was the

sum of twenty-five (25c) cents per pound, and these defendants allege that they had enough hops of said crop of the quality required under the contract to fulfill the terms thereof and that the defendants were at all times ready, able and willing to deliver said hops to said purchasers and were willing to do so at any time during the life of said contract if the said purchasers had not refused to take said hops; and referring to the allegation in the complaint that the defendants sold the hops and shipped them out of the State of Oregon, the defendants allege that the hops were not sold until March, 1913, and were held in the said warehouse until that time without any incumbrances whatever, except as the said purchasers might have claimed, as they at all times well knew.

V.

That the defendants, on or about the 12th day of March, 1913, were compelled to and did sell said hops at the average price of about twelve (12c) cents per pound, which was the reasonable market value of said hops in Lane County, Oregon, where said hops were raised, being such hops as are mentioned in the contract between said parties, and by reason thereof the defendants suffered a loss amounting \$3 900.00, all of which was caused on account of the said purchasers not complying with their said contract, and these defendants demand that the said damages amounting to \$3,900.00 be counter-claimed and offset against any sum that the plaintiff might

be adjudged to be entitled to recover from the defendants on account of said contract.

Defense based on arbitration clause omitted.

Wherefore, Said defendants demand judgment against the said purchasers and against their said alleged assignee for the sum of \$3,900.00 damages for the breach of said contract by the said purchasers and that the same be offset against the amount of said advances made to the defendants under said contract, and that the defendants have and recover of and from the plaintiff the excess of said damages, amounting to \$900.00, and for their costs and disbursements of this action.

WOODCOCK, SMITH & BRYSON,
and
MANNING, SLATER & LEONARD,
Attorneys for Defendants.

Verification omitted.

EXHIBIT "A"

Date. THIS INDENTURE, made and entered into this 29th day of May, 1912,

Parties to Agreement. between J. M. Edmunson and Mrs. M. J. Edmunson, by occupation farmers, of Goshen, County of Lane, State of Oregon, hereinafter called the seller, and KLABER, WOLF & NETTER, of Portland, Oregon, County of Multnomah, State of Oregon, hereinafter called the buyer.

Consideration. WITNESSETH, In consideration of the sum of One Dollar (\$1.00) paid to said

Seller by said Buyer at the time of the execution of this Agreement, the receipt whereof is hereby acknowledged, and of the further covenants and agreements herein contained on the part of both parties to this agreement.

Sale. The Seller has bargained and agreed to sell and by these presents does hereby sell, and the Buyer has bargained and agreed to purchase and by these presents does hereby purchase the following described personal property, to-wit:

Quantity. Thirty Thousand (30,000 lbs.) pounds (net weight) of his crop of hops of the growth of the year 1912.

Description of Realty.—Omitted.

Quality. The said Seller hereby agrees to cultivate, carefully spray, cleanly pick, properly dry, cure and bale and prepare for market all of the said hops grown on the above described property, in a good and husbandlike manner. (The said hops covered by this instrument shall be of first quality, i. e., of sound condition, good and even color, fully matured, but not over-ripe, flaky, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter, and not affected by spraying or vermin damage. Said hops shall not be the product of a first year's planting.)

Baling. Said hops are to be put up in bales of 185 lbs. to 210 lbs. gross weight each, in new twenty-four (24) ounce baling cloth.

Tare. The tare to be deducted from the weight of each bale shall be five (5) pounds.

Price. The said Buyer hereby agrees to pay to the said Seller at the rate of Twenty-five cents per pound (25 cts.) for the hops above sold when delivered in accordance with the specific terms of this agreement.

Advances. The said Buyer hereby agrees to advance to said Seller, as part payments under this contract, upon ten days request therefor in writing, the following sums:

Twelve Hundred dollars (\$1,200.00) on or about May 31, 1912.

.....dollars (\$.....) on or about
....., 190...., and

Eighteen Hundred dollars (\$1,800.00) on or about Sep. 1st, 1912,

as actually required for picking purposes. The said Buyer hereby agrees to make all advances under this contract by check, currency, or U. S. coin, at his office or at the office of his authorized agent. The said Seller hereby agrees to call for and accept the advances to be made under this agreement, as hereinbefore specified, at the office of the Buyer or his authorized agent.

Inspection. The said Buyer shall have the privilege of inspecting all of the said hops grown by the said Seller upon the above described property, either on the farm of the said Seller or at any place the

said hops may be stored or located, and selecting therefrom the quantity sold under this contract.

Delivery. The said Seller hereby agrees to serve written notice of his intention to deliver said hops to the said Buyer or his authorized agent, executors, administrators or assigns at least fifteen (15) days before the day on which he proposes to tender the said hops sold under this agreement for inspection and delivery, which said notice shall be personally served upon the said Buyer or his authorized agent. The said Seller also agrees that this notice for inspection and delivery shall not be served upon said Buyer until such time that all of the hops grown by the said Seller shall be baled and in shipping condition. It is also agreed by the parties to this instrument that the said Seller shall not tender any part of his crop of hops for inspection or delivery on any other sales or contracts until the hops sold under this agreement shall have been delivered; it being expressly understood and agreed by the parties to this instrument that this contract shall have preference, both as to quality and quantity, over all other contracts or sales in relation to said growth of hops.

The said Seller hereby agrees to deliver or cause to be delivered unto the said Buyer, or his authorized agent, executors, administrators or assigns, all of the hops accepted under this agreement free of and discharged of all liens and encumbrances of whatsoever kind and nature, on cars or in warehouse at Goshen, Ore., between Oct. 1st, 1912, and Oct. 31st, 1912. All

of said hops shall be delivered in lots of not less than entire lot bales, f. o. b. cars or warehouse, as the Buyer may elect.

Interest. It is agreed between the parties to this contract that all advances made hereunder shall bear interest from the date of the acceptance thereof, and shall be at the rate of per cent per annum.

Balance of Payments. The Buyer hereby agrees to pay the Seller the amount due under this contract, less advances made hereunder, and interest thereon, providing the quality and quantity are in strict accordance with the terms of this contract, and when said hops have been accepted by and delivered to the said Buyer, and after all of the other conditions named herein shall have been accomplished.

Insurance. (Omitted.)

Inferior Quality. If in the judgment of the said Buyer the quality of all or any portion of the hops tendered under this contract by said Seller should be inferior, from any cause whatever, to the quality of hops above specifically called for, it shall be the duty of the Seller to tender to said Buyer the said hops raised, and the said Buyer may have the right of accepting the entire quantity contracted for, or any part less than the entire quantity contracted for at a reduction in price, which reduction shall be equal to the difference between the market value of such hops tendered under this contract by said Seller and the market value of such hops at the time of the ex-

execution of this contract as are herein specifically called for to be delivered.

Insufficient Quantity. If from any cause whatever the said Seller should deliver or tender for delivery a quantity of hops less than the quantity above contracted for, it shall be the duty of the Seller to tender to said Buyer the said hops raised, and the said Buyer may have the right of accepting the quantity tendered and shall be entitled to damages for the amount short delivered, which damage shall be equal to the difference in market value at the time of delivery of this contract between the quantity and quality above called for and the quantity and quality actually tendered or delivered.

Arbitration. (Omitted.)

Security. (Omitted.)

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first above mentioned.

J. M. EDMUNSON, (Seal.)

M. J. EDMUNSON, (Seal.)

KLABER, WOLF & NETTER,

By A. R. ZELLER, (Seal.)

Witnessed by:

L. R. Edmunson.

C. M. Kissinger.

Nella Blade.

Acknowledgments omitted.

And thereafter, on March 17th, 1916, the plaintiff filed his reply herein in words and figures, as follows:

REPLY

(Title omitted.)

Plaintiff, for reply to the amended answer filed by the defendants herein, admit, deny and allege as follows:

Answering paragraph nine of the said answer, deny that at the time said hops were ready to be delivered to the purchaser, or at all, the price had gone down to at least 10c per pound below the contract price or any other sum below the contract price greater than 4c.

Deny each and every allegation contained in paragraph ten of the said answer except as otherwise alleged in the amended complaint.

Admit the allegations of paragraph eleven.

Plaintiff, replying to the further and separate answer and defense set out in the amended answer and by way of counter-claim thereto, admit the allegations of paragraph one thereof.

Admits that the defendants, in the year 1912, raised on the said yards about 40,000 pounds of hops and that they were picked, dried and baled and stored in a warehouse in Goshen, Oregon, on and between the first and thirty-first day of October, 1912, but denies that the same were picked, dried and baled according to the terms of said contract or at all or

otherwise, except as alleged in the amended complaint.

Denies each and every other allegation contained in paragraph two of the said amended answer.

Denies each and every allegation contained in paragraph three of the said further and separate answer.

Denies each and every allegation contained in paragraph four of said further and separate answer, except as admitted by the allegations of plaintiff's amended complaint.

Denies each and every allegation contained in paragraph five of said further and separate answer, except as otherwise stated and alleged in plaintiff's amended complaint.

Reply to answer based on arbitration clause omitted.

Wherefore, plaintiff having fully replied to the amended answer herein, prays for judgment as in his complaint asked for.

WILLIAMS & BEAN,

Attorneys for Plaintiff.

Verification omitted.

That thereafter the said cause came on for hearing in the said United States District Court for the State of Oregon, before the Honorable Charles E. Wolverton, Judge of said Court, and jury duly empaneled to try said cause, plaintiff appearing by his attorneys, John M. Williams and Louis E. Bean, and

the defendants by Mr. W. T. Slater of counsel, and the said cause proceeded from day to day until the 29th day of February, 1916, when the cause was submitted to the jury after argument by counsel and instructions by the Court, and upon said day the jury returned into Court the following verdict:

VERDICT

“We, the jury duly empaneled and sworn to try the above entitled action, find for the defendants in the sum of \$400.00.

“E. M. SIMONTON, Foreman.”

Which verdict was received by the Court and ordered to be filed and the following judgment entered thereon in the Journal of said Court:

JUDGMENT

“Whereupon, it is considered that said plaintiff take nothing by this action and that said defendants do have and recover of and from said plaintiff the sum of \$400.00, together with their costs and disbursements, taxed herein at \$64.80.”

And at said time the plaintiff was granted sixty (60) days in which to file a motion for a new trial herein.

That thereafter, on March 17th, 1916, the plaintiff filed his motion for a new trial herein as follows:

MOTION FOR NEW TRIAL

(Title omitted.)

Comes now the plaintiff in the above entitled cause and moves the Court to set aside the judgment and verdict herein and to grant the plaintiff a new trial on the grounds as follows:

First. That the verdict is against the evidence in this case.

Second. That there is no evidence in this case to sustain the verdict of the jury; that there was no evidence that there were thirty thousand pounds, or anywhere near that number of pounds of hops of the quality described in the contract, produced by Edmunson during the year 1912.

Other grounds omitted.

Respectfully submitted,

WILLIAMS & BEAN,

Attorneys for Plaintiff.

That on the 20th day of March, 1916, the said motion for new trial came up for hearing, plaintiff appearing by Mr. J. M. Williams, of counsel, and the defendant appearing by Mr. W. T. Slater, of counsel. The Court, after hearing the argument of counsel thereon, made the following order:

ORDER DENYING MOTION FOR NEW TRIAL

“It is hereby ordered and adjudged that said motion be and the same is hereby denied.”

And afterwards, on the 9th day of August, 1916, there was duly filed in said Court a petition for Writ of Error, and on the 10th day of August, 1916, there was filed an Undertaking for the prosecution of said Writ to effect, in the sum of \$500.00, signed by J. W. Seavey and Charles M. Werner as sureties, on said 10th day of August, 1916, a Writ of Error was duly issued and citation in regular form was duly issued by the Judge of said Court, and an acknowledgment of service endorsed thereon by W. T. Slater, of attorneys for the defendants, and on the said 9th day of August, 1916, there was duly filed in said Court an Assignment of Errors in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS

(Title of Court and Cause.)

Now comes Max Wolf, plaintiff in error, in the above numbered and entitled cause, and in connection with his petition for a Writ of Error in this cause, assigns the following errors, which plaintiff in error avers occurred on the trial thereof, and in the final disposition thereof, and upon which he relies to reverse the judgment entered herein as appears of record:

This action was brought by plaintiff to recover advances amounting to \$3,001.00 on a hop contract for the purchase of 30,000 pounds of hops of the defendant, during the season of 1912. The hops were to be of first quality, that is: sound condition, good and

even color, fully matured but not over-ripe, flaky, cleanly picked, properly dried and cured, free from sweepings and other foreign matter and not affected by spraying or vermin damage. That the defendants grew some 40,000 pounds of hops upon their premises, and upon inspection of the said hops plaintiff avers that they were found to be slack dried, bad and uneven in color, of unsound condition, not fully matured, not properly dried or cured, and affected by vermin damage. Plaintiff introduced numerous expert hop inspectors as witnesses, who gave testimony that the said hops, upon inspection, were of a bad and uneven color, of an unsound condition, not fully matured, not properly dried and cured, and that they were affected by vermin damage. The contest between the parties turns around these points.

I.

The Court committed error in permitting Ross H. Woods, one of the plaintiff's expert witnesses to answer the following question on cross examination, over the objection of plaintiff as follows: Said witness was testifying with reference to the color of the hops and was asked this question:

Q. What you men mean to get at is the general average of the crop?

Objected to as incompetent, irrelevant and immaterial, which objection was overruled by the Court, and to which plaintiff saved an exception.

The witness answered: Well, yes. There was some of them green in each sample and some of them

were ripe, mixed as you were talking a while ago about where those were dumped off the kiln floor.

II.

The Court committed error in permitting J. M. Edmunson, who was called as a witness in his own behalf, to answer the following question in attempting to discredit the inspection made by the plaintiff's experts:

Q. Now, what is your experience with hop inspectors as to their being uniform in their judgment as to the quality of hops?

Which question was objected to by plaintiff as incompetent, irrelevant and immaterial.

COURT:—I think that is an inquiry about the quality in effect of the hops. You may answer.

To which ruling the plaintiff duly saved an exception, which exception was allowed by the Court.

The witness answered: I find that they vary considerable, one will call a hop prime and the other medium, etc., they will vary as much as one grade and some vary two grades.

III.

The Court erred in permitting the defendant, J. M. Edmunson, to answer the following question, over the objection of the plaintiff:

Q. Now, what do you say as to whether at the time that Mr. Hinkle inspected these hops on the 31st day of October, that you had 30,000 pounds of hops there of the quality described in that contract?

To which question plaintiff objected as incompe-

tent, irrelevant and immaterial and as calling for a conclusion of the witness on this matter.

COURT:—He says he inspected the hops, he can give his judgment as to that amount; to which ruling of the Court the plaintiff duly excepted, which exception was allowed by the Court, and witness answered:

I considered that I had more than enough hops of the quality that would be sufficient, that would go on the contract. There was perhaps 50 bales or 60, between 50 and 60 bales, hops extra, besides enough. I had over 40,000 pounds according to my recollection, in the whole crop.

IV.

Bert Pilkington was called as a witness on behalf of the defendants, and after testifying to his qualifications as a chemist, as more fully shown hereafter in quotations from Bill of Exceptions, and while testifying in regard to the chemical analysis of the hops was interrupted by the objections to the witness' testimony along the line of chemical analysis of hops as incompetent, irrelevant and immaterial and an attempt to impose in this case a standard different than that of the hop men. The Court made the following ruling: There has been testimony here coming from the witnesses produced by the plaintiff touching the amount of resin or pollen, as it has been described, or the lupulin that is contained in these hops, some saying that it had more and some less, and that seems to be the prime quality of the hop. If this witness

is competent to testify concerning the quantum of lupulin in the hops, or the specimens that he examined, I think that would be proper to go to this jury. To which ruling an exception was duly saved.

The said ruling is assigned as error. The Court committed error in overruling the objection and in making the said ruling.

V.

The Court erred in permitting the witness, Bert Pilkington, to testify with reference to a sample of hops furnished him by J. M. Edmunson.

Q. Now, what percentage of resin did you find in these hops?

Objected to as incompetent, irrelevant and immaterial; to which ruling an exception was duly saved. The witness answered: Why, the sample Edmunson handed me had 18.15 per cent total resin, and of that total resin, there was 16.24 what is known as soft resin.

VI.

The witness, Bert Pilkington, testified that he had received from hop growers and dealers samples of hops marked with the grading, and the Court committed error in permitting said witness to answer the following question:

What quality of hops were they claimed or styled to be, and the previous objection was renewed, which was that the testimony is incompetent, irrelevant and immaterial, a matter of hearsay only. The witness was not competent to judge. The objection was

overruled, to which ruling an exception was duly allowed. Witness answered:

Why, some of them were graded fancy, some choice, some prime, some medium. I don't think we had a sample marked "poor" in the entire lot.

The Court then asked the witness if he knew what a choice hop is in the market, and he answered: I cannot go out in the market and pick out a choice hop by just going around and feeling of it, or looking at it.

VII.

After some colloquy between the Counsel and the Court, and questions by the Court, the Court sustained the objections to this witness testifying with reference to the quantity of resin in the samples of hops sent him by other parties, and was excused.

The Court afterwards had the witness recalled and permitted him to testify over the objection of the plaintiff as incompetent, irrelevant and immaterial, which objection was overruled by the Court and exception duly allowed.

That the Court committed error in reversing the ruling and permitting the said witness to testify. The witness testified as follows:

One sample of choice hops by Judge No. 1, 1911 crop, contained 19.42 per cent total resin; and the other sample of choice hops, by Judge No. 2, 1911, contained 19.46; and the other sample of choice hops, by Judge No. 3, 1911, contained 19.98 per cent total resin. Prime, 1911, by Judge No. 1, contained 17.23;

next prime, by Judge No. 1, 1911, contained 18.83 per cent; and the next prime, by Judge No. 3, crop 1911, contained 20.19 per cent; the next prime, 1911 crop, Judge No. 3, 19.42 per cent; No. 2 Judge, 1911 crop, prime, 19.04 per cent. Now prime 1910 crop, by Judge No. 1, 15.95 per cent total resin. Medium—we have only two mediums. They are both 1910 crop. One is 17.21 per cent, by Judge No. 1. Another one is 13.46 per cent, by Judge No. 1.

VIII.

That the Court erred in overruling the motion made by plaintiff to strike out all the testimony of the said witness, Bert Pilkington, as being incompetent, irrelevant and immaterial, and as assuming that a hop that contains eighteen per cent and a fraction, whatever it is, is a choice hop, or a hop that is a first quality under this contract, which motion was overruled by the Court, and the Court duly allowed an exception thereto.

The material testimony given by the witness, Bert Pilkington, with the objections thereto and the rulings thereon and exceptions are more fully shown by quotations from the Bill of Exceptions for the purpose of showing the materiality of the said objections, and said motion is as follows:

The witness testified that he was a graduate chemist, was employed in the chemical department of the Agricultural College of the State of Oregon, since 1905; that he had undertaken an investigation of the characteristics of hops.

Q. Please explain the character of the work?

A. Well, for instance, one of the particular features was a revision of the method of chemical examination of hops.

Q. What was the final object in obtaining this process of chemical analysis?

A. The thing that led up to that was the variation, or so-called variation, in the examination or the commercial judging of hops. And the attempt at that time—it was taken up as an Adams project, under the Adams fund, by the Federal Government, to see if they could arrive at some definite method for examining hops, whereby hops would be given examination according to their worth.

Q. Did you examine some samples of hops that he sent you in 1913?

A. Yes, sir, I did.

Q. About what time in the year was that?

A. That was somewhere between the 1st and the 10th of June, if I remember right. I don't remember the exact date.

Q. Now, did you make a chemical analysis of those hops to ascertain the amount of brewing quality in them?

A. Well, the chemical analysis shows the resin quantity.

MR. WILLIAMS:—We desire to make the objection to this witness' testimony along that line for the reason that it is incompetent, irrelevant and immaterial, and an attempt to impose in this case a stand-

and different from that of the hop men.

COURT:—There has been testimony here, coming from the witnesses produced by the plaintiff, touching the amount of resin, or pollen, as it has been described, or lupulin that is contained in these hops, some saying that it had more and some less; and that seems to be the prime quality of the hop. If this witness is competent to testify concerning the quantum of that lupulin in the hops, or the specimens that he examined, I think that would be proper to go to this jury. You may proceed.

MR. BEAN:—We save an exception.

Q. Now, Professor Pilkington, you said you made a chemical analysis of these hops?

A. That Mr. Edmunson furnished me?

Q. Yes.

A. I did.

Q. And according to the scientific method used for that purpose?

A. Yes, sir.

Q. Now, what percentage of resin did you find in these hops?

Objected to as incompetent, irrelevant and immaterial.

COURT:—I think I will hear that. The objection will be overruled.

MR. WILLIAMS:—We desire an exception, your Honor.

COURT:—Very well.

A. Why, the sample Mr. Edmunson handed me

had 18.15 per cent total resin, and of that total resin there was 16.24 what is known as soft resin.

COURT:—What?

A. Soft resin. You might say there were three resins in the hop.

Q. What was the third resin?

A. That is what they call a hard or worthless resin. That amounts to the difference between the total resin and the soft resin; three resins comprising the makeup of that part of the hop.

Q. Did you ever make any examination of this kind of hops that are pronounced by experts as choice hops?

Objected to as incompetent, irrelevant and immaterial.

COURT:—Do you know what a choice hop is, in your experience; that is, choice hop measured by the commercial rule?

A. No, sir, I do not.

COURT:—You do not?

A. No, sir.

MR. SLATER:—Your Honor, I want to show that the percentage of resin found in this particular sample of hops—its relation to the percentage found in the hops of different qualities that he examined.

COURT:—Well, unless he knows the percentage that exists in the commercial hop of the different qualities, it doesn't seem that he would be competent to testify. If you can show by this witness

that he is acquainted with commercial hops, and the amount of resin, for instance, in a prime hop, or a choice hop, or a medium hop, then his testimony would be competent on that point.

Q. Now, what different qualities of hops were these samples that you received; represented to you to be, by those who gave them to you?

MR. WILLIAMS:—Objected to as incompetent, irrelevant and immaterial; matter of hearsay only. The witness was not competent to judge.

Objection overruled. Exception allowed.

A. Do you mean by that the grading?

Q. Yes. What quality of hops were they claimed or styled to be?

MR. WILLIAMS:—I desire to renew our objection, your Honor.

Objection overruled. Exception allowed.

MR. SLATER:—That will be understood.

A. Why, some of them were graded fancy, some choice, some prime, some medium. I dont think we had a sample marked “poor” in the entire lot.

COURT:—Do you know what a choice hop is in the market?

A. I couldn't go out in the market and pick up a choice hop, just by going around and feeling of it, or looking at it.

COURT:—Do you know the amount of resin there should be in a choice hop as sold in the market?

A. That would depend on who judge the hop.

COURT:—That would depend on what?

A. That would depend on who graded the hop, whether it was a choice hop, or prime hop, or medium hop. That was what this work was for. I might say, in explanation, what this work was for was to compare these different gradings by different judges.

COURT:—Then there is no uniformity in grading?

A. Not according to these different judges; they don't agree.

MR. WILLIAMS:—That is the very vice, your Honor.

COURT:—That is the kernel of the cocoanut in this case, it seems to me, the very thing we are trying to get at now. Now, if you know what a choice hop is in the market, why then you can measure your chemical analysis of your resin in the hops you have examined with choice hops. Otherwise, I don't see that we can get a correct estimate in this case upon this particular question.

MR. SLATER:—Your Honor, I think his testimony may be relevant to show the percentage of resin in this particular hop as compared with other samples of hops known in the market as choice, medium and prime, the percentage that might be in them. It is true this witness might not be competent to testify that he can pick out a choice hop.

COURT:—He says he doesn't know, of his own knowledge, what a choice hop is; nor a prime, nor medium. He says that knowledge he has comes

from samples of hops that have been sent to him which have been represented to be so and so. Then he says the judges themselves don't agree upon what is a choice hop, and the amount of resin that should be contained in a choice hop. That is the trouble in making the comparison here.

MR. SLATER:—Well, your Honor, in order to make the record than, we desire to show by this witness that this witness made chemical analysis of a large number of different grades of hops, and that the averages run from 13.49 per cent; and that the minimum percentages for the year in which he made the examination in question was 15.54 per cent; the maximum was 20.49 per cent, and the average 18.06 per cent. That is the testimony that we offer to show by this witness.

COURT:—You don't know, of your own knowledge, about the samples, whether they were choice or prime or medium as to quality?

A. No. We didn't care for that on this other work we were undertaking. We asked—if I may make an explanation there?

COURT:—Yes.

A. We asked that these judges, or asked M. Livesley to send us in a sample of hops judged by different judges, and then we wanted to analyze those hops, and see how those judges agreed. Now, that was the object of that piece of work that we undertook at that time. Now, those hops were graded according to the terms on the hop market.

COURT:—You were inquiring only as to one quality, and that was the quality of the amount of lupulin?

A. No, I might say this—well, that was the standard by which we were measuring; that is, the resin—to see if the resin in a choice hop graded by Judge No. 1 would agree with Judge No. 2, or whether medium graded by one judge, a hop graded by one judge as a medium would have the minimum amount of resin equal to a choice hop graded by another judge; to see if a medium fell in a definite class—if their judgment compared as to the amount of resin it contained.

COURT:—I don't think that that elucidated anything in this case particularly. I will sustain the objection, and you may have your exception.

Excused.

COURT:—Is Mr. Pilkington here?

MR. SLATER:—He was out in the hall a moment ago.

COURT:—I think I will take his testimony in regard to the amount of resin in the samples. After thinking that matter over, I think it would be a better ruling to let that go to the jury.

MR. WILLIAMS:—We will take an exception, if your Honor please.

COURT:—You may have your exception.

BERT PILKINGTON:—Resumes the stand.
Direct examination continued.

COURT:—I have concluded that you might an-

swer as to the amount of resin you found in these different samples. I think the manner in which you obtained the samples has been sufficiently explained heretofore. You may have your objection, and your exception to the Court's ruling.

The witness was then permitted to refer to memorandum written by him with reference to hops of different qualities.

COURT:—Well, now, who are the judges?

A. I don't know who the judges were. Mr. Livesley furnished these samples. The pamphlet there states how those samples were procured and the object of getting those. These samples were numbered, and the grade was put with that number in the letter sent to us, and the samples forwarded at the same time.

Q. Is Mr. Livesley a regular dealer in hops, in this state?

A. Yes.

Q. An extensive dealer?

A. He was at that time, yes.

Q. Do I understand you that Mr. Livesley furnished all these samples?

A. Those samples that are given there? No, Mr. Livesley did not furnish all the samples. Mr. Seavey furnished part of the samples. If I remember right, the larger number of the samples were received from Mr. Livesley.

COURT:—I think you may give the names of gradings according to the samples sent you, the

judging of those samples. Just give the general range. Take the prime, for instance. Take the choice, for instance, and then prime, and indicate it.

A. All right. One sample of choice hops by Judge No. 1, 1911 crop, contained 19.42 per cent total resin; and the other sample of choice hops, by Judge No. 2, 1911, contained 19.46; and the other sample of choice hops, by Judge No. 3, 1911, contained 19.98 per cent total resin. Prime, 1911, by Judge No. 1, contained 17.23; next prime, by Judge No. 1, 1911, contained 18.83 per cent; and the next prime, by Judge No. 3, crop 1911, contained 20.19 per cent; the next prime, 1911 crop, Judge No. 3, 19.42 per cent.

COURT:—What was that that contains 15 per cent?

A. I haven't come to that one yet. I will get at that in just a minute. No. 2 Judge, 1911 crop, prime 19.04 per cent. No. . . , prime, 1910 crop, by Judge No. 1, 15.95 per cent total resin.

COURT:—So the prime varies all the way from 15.95 to about 20 per cent.

A. To about 20½.

COURT:—Well, now, give the medium.

A. Medium—we have only two mediums. They are both 1910 crop. One is 17.21 per cent, by Judge No. 1. Another one is 13.46 per cent, by Judge No. 1.

At the close of witness' testimony, plaintiff made the following motion:

MR. WILLIAMS:—To save the question, we move to strike out all the testimony of this witness, as being incompetent, irrelevant and immaterial, and as assuming that a hop that contains eighteen per cent and a fraction, whatever this is, is a choice hop, or a hop that is of a first quality under this contract.

COURT:—The motion will be overruled. You may have your exception.

IX.

That the Court erred in denying the plaintiff's motion for a new trial and abused his discretion by refusing to grant a new trial, which motion was based upon the following grounds, to-wit:

First. That the verdict is against the evidence in this cause.

Second. That there is no evidence in this cause to sustain the verdict of the jury; that there is no evidence that there were 30,000 pounds or anywhere near that number of hops of the quality described in the contract produced by J. M. Edmunson during the year 1912.

That the only testimony in this cause given on behalf of the defendants that there were 30,000 pounds of hops raised by them of the quality described in the contract that could possibly tend to show that fact was the answer of J. M. Edmunson to the following question:

Q. Now, what do you say as to whether at the time that Mr. Hinkle inspected these hops on the 31st of October, that you had 30,000 pounds of hops

there of the quality described in that contract?

A. I considered that I had more than enough hops of the quality that would be sufficient, that would go on the contract. There was perhaps 50 bales or 60, between 50 and 60 bales, hops extra, besides enough. I had over 40,000 pounds, according to my recollection, in the whole crop.

That witness was testifying with reference to a conversation he had with Mr. Hinkle with reference to quantity said: I had more than the contract called for, and they had the privilege of selecting from the whole bunch, from all the bales, and he was asked this question:

Well, what was said, if anything, by you as to the quality of the hops?

A. I told him I thought I had hops good enough to fill the contract, a sufficient number of them.

This was all the testimony given by J. M. Edmunson along that line. He then testified in answer to this question:

What is your opinion as to what quality they were?

A. Well, I considered that I had over 20,000 pounds choice hops in the lot.

COURT:—Over how many?

A. Twenty thousand pounds. And the rest of the hops would grade prime, with the exception of what they called the ripe end. That was the seven or eight bales that they called over-ripe and the ends of the leaves were turned red.

Then in answer to this question:

Now you may state to the jury to what, if any, extent any of these hops were affected by mold?

A. Well, there was about 20,000 pounds of them that didn't have any mold, you might say. I call them free of mold. And the rest of them ran along gradually until the end of the season and they had some little mold in them; until the final end, the last day or two of picking, they had considerable mold in them and were over-ripe.

Then on cross examination, the witness was asked:

Q. How did you make your calculation that there were about 20,000 pounds that were choice hops?

A. Well, Mr. Woods picked out about 20,000 pounds that he claimed was the best of the hops. I never picked out the exact amount myself, because I was not grading them, but it ran fully that much or more; how much more they would run, I don't know.

Then witness was asked this question: And these 20,000 pounds were not affected by spraying or vermin damage?

A. No, sir.

Q. Now, how about the second lot, John?

A. Well, the second lot had a small amount of mold in them. That was all the difference. They were really a ripper and better hop.

Q. There was some mold in the second carload?

A. Yes.

Q. Sufficient to make them take a lower grade?

A. No, I don't know. It is the way I graded them, anyway. They were a good prime hop, and a prime hop is not supposed to be perfect.

Wherefore, plaintiff in error prays that the judgment of said Court be reversed and that a new trial be directed in this cause.

JOHN M. WILLIAMS and
LOUIS E. BEAN,
Attorneys for Plaintiff in Error.

That orders were made from time to time granting plaintiff until August 1st, 1916, in which to file a bill of exceptions herein, and on the 29th day of July, 1916, a bill of exceptions was agreed upon, signed and filed herein as follows:

BILL OF EXCEPTIONS

(Title omitted.)

Be it remembered, that this cause came on for trial before the court and jury, a jury having been regularly impaneled to try the cause on the 24th day of February, 1916, whereupon the following proceedings were had from day to day until the 29th day of February, 1916, and taken in the course of the trial, the details and evidences stated below being incorporated in this bill of exceptions, being all of the evidence produced in said cause with reference to the quality and quantity of the hops in the

contract in litigation herein, for the purpose of passing upon the motion for new trial.

Max Wolf, being called as a witness in his own behalf, testified in substance: That during all the year 1915 he was a resident and citizen of San Francisco, California; that he took up his permanent residence in San Francisco in 1913; that in fact he lived nearly all his life in San Francisco, but was a resident of Portland, Oregon, during a part of the year 1912, and he took up his residence in Portland on account of the Klaber estate, and moved back to San Francisco about nine or ten months afterwards, in 1913 and reassumed his permanent residence in San Francisco, and has been a resident and citizen of San Francisco ever since.

The Court, in ruling on another question, said: "I suppose the other question would probably come up in this case as to whether Mr. Wolf has a standing in Court by reason of citizenship." Mr. Slater, of counsel for defendant, replied: "No, we don't intend to raise that question."

The witness testified that Netter died in September, 1913; that at the time of his death he and Mr. Netter were partners doing business under the firm name and style of Klaber, Wolf & Netter, in Portland, Oregon, and that the contract set out in the pleadings in this cause was made under the firm name of Klaber, Wolf & Netter, by the witness and Marcus J. Netter, as partners doing business under that firm name, Portland, Oregon.

(Testimony of H. A. Hinkle.)

H. A. Hinkle, being called as a witness on behalf of plaintiff, testified: That he has resided in Portland, Oregon, practically all his life; that he is with the Wolf Hop Company, and has been in the hop business about twenty-one years, and has been inspecting and grading hops for about eighteen years in Oregon and Washington, and was employed by Klaber, Wolf & Netter in 1912 and inspected the hops that were raised that year by J. M. Edmunson, the defendant; that he first saw the hops between the first and third of October of that year. Continuing, the witness testified:

“Between the first and third of October, by appointment, I met Mr. Edmunson at Goshen, for the purpose of inspecting those hops; and that morning we went over to examine them, and they were piled up in a warehouse and very little room to work. So I suggested that we line them up. Mr. Edmunson said that he was not able to work, and we could not get anyone to assist us to move the bales, and we got a few samples. I think we cut out two samples, and I requested of Mr. Edmunson if he knew where his best hops were that I would like to get samples of his very best ones. And we cut out, I think, two samples, and I told him at the time unless he had better hops than the samples that I had pulled at the time, that they were not the quality called for in the contract and would not go. But there was only one way to find out, and that was an inspection of each bale,

(Testimony of H. A. Hinkle.)

which was impossible for us to get at that day. That the color was dull, and some brown buds. One of them was slack, that is in quality, that would cause it to become brown. A hop, if you are not familiar with—it is bright; that is, a hop that is as it should be is bright in color and silky. You take a hop that is what you call brown buds, they are discolored and dull, and are of different grade than what a first quality hop would be. They were damaged by vermin, because they contained mold. Vermin is lice that comes on hops, and unless they are properly sprayed, as a rule, they cause the hop to become moldy. Of course, there is years when the weather conditions and things—the sun is warm—that the lice will leave them, and they are not as bad. But as a rule, hops that are not sprayed well become damaged by mold.

Q. To what extent was this vermin damage present in the samples that you obtained?

A. Well, they were immature. That was caused by vermin, where the vermin forms a honey-dew, in other words, and stops the growth of a hop, and they never mature up as they should if they were not affected by vermin.

Continuing, the witness testified in substance: that a slack hop is one not properly dried, not being left in the kiln long enough; a hop that has mold is not of sound quality and immature; that he told the defendant that it would be necessary to inspect all of the hops to find out whether there were any better

(Testimony of H. A. Hinkle.)

hops; that the defendant said he was in no hurry and that it would suit him better if the final inspection could be put off for a while, and that evening the conditions were reported to Portland, and witness was requested by the Portland office to go back the next morning and see if he could not possibly go through the crop; that he met Mr. Edmunson again by appointment in Goshen, and Mr. Edmunson said he was unable to get anybody to handle the hops; that they are pretty hard to handle and require some room.

That the next time he saw the hops was on the 30th or 31st of October, one of these two days; that Mr. Hayes and myself went out to Mr. Edmunson's farm, met Mr. Edmunson and told him he came for the purpose of inspecting the hops; on the 30th or 31st of October, I am not positive as to the date, and Mr. Edmunson said, "Well, you have already rejected them." Witness told him positively that they had not rejected the hops as a whole, and requested permission to inspect them, and finally after some talk he consented and went over and inspected the hops. "We inspected each bale, and I am not positive, but I am pretty sure that Mr. Edmunson requested that we put a grading mark as I would grade them on the hops, marking them one, two, three or four; and he himself, I think, put these marks on according to my grading. I think there were 104 bales that was marked with one, 80 bales that were marked

(Testimony of H. A. Hinkle.)

with a 2, 29 bales slack, and two bales that was perished. The 104 bales that were the brightest of his hops were about mediums. A medium is a third grade hop. The grades would be choice, prime and medium." He testified that he had read over the contract involved and that the first quality as described and defined in the contract would be a choice hop.

These 104 bales all contained vermin damage, they had more or less mold in all of them. What made them a third grade was that they were coarse and uneven color, containing mold, and stewed, and discolored buds, and there were several reasons for bringing them into the medium grade.

That he discussed this question of the damage in the hops with the defendant and told him that they were of inferior quality and not according to the contract; that he did not say very much, in fact I don't think he said anything. He did say that possibly they were better than what I thought they were.

That the next 80 bales were duller in color and contained more mold and were fully a half grade lower than the others at least.

That Mr. Edmunson did not claim that they were free from vermin damage, nor did he claim that they were even in color, and made no claims whatever that they were of any quality or that they were hops like called for in the contract; that witness told him we would submit it to arbitration or get somebody

(Testimony of H. A. Hinkle.)

else to inspect them if he did not like the grading, and Mr. Edmunson made no reply to this.

That the witness demanded the return of the advances, and that Mr. Edmunson said he could not do anything at present until after he could do something with the hops; that the next conversation that he had with him about the advances was in the following March, when witness demanded the money; that he went to Eugene, to see what he could do about getting the money, and met Mr. Edmunson, and demanded the money from him after he had sold the hops, and Mr. Edmunson told him that he did not intend to pay it back; that this was the first time that he had told him that.

On cross examination, witness testified: That on the 30th or 31st of October, 1912, admitted that it was on the 31st, when he was there he made a thorough inspection of the hops as follows: The customary way of inspecting hops, we use a tryer and stick it into the bale and we pull out a handful of each bale and then at intervals we draw square samples, about a pound. But this tryer we use pulls out enough hops that you can tell the color and flavor of the hops. This is the customary way of inspecting. That there were 104 bales of this lot of hops that was No. 1, that is, the best of his lot. Being asked what was the matter with the flavor of the hops, said they had a stewed flavor, as if they had been left either in the field and heating on the stacks, or put on the kiln, by the kiln

(Testimony of H. A. Hinkle.)

being overloaded and settling and continuing to fire causes the flavor to be poor. That these 104 bales might have been a little better than medium on a pinch; that the grade of hops above medium is primes, and above prime, choice. Being asked to describe a choice hop, said: A choice hop is bright and flakey, free from mold, good even color, fully matured, not damaged by vermin or anything like that, full of lupulin, and of good flavor. You have to have a good flavor to make a choice hop. The witness' attention was called to the fact that the contract said nothing about flavor.

Q. Then, in that event, you would say the flavor didn't have anything to do with the choice hop?

A. The flavor would have a lot to do with the choice hop.

Q. Well, but if this contract does not specify a good flavor, how can you tell it calls for a choice hop?

A. Because it calls for first quality hop.

Q. This contract describes what a first quality hop is. And among the items of first quality is not good flavor.

A. It would have to be of good flavor to be a choice hop.

Q. Then you must admit that if this contract does not call for first flavor hops, or good flavor hops, it is not calling for a choice hop, is it?

A. Yes. It is calling for a choice hop anyhow.

Q. Now, I wish you would state to the jury what

(Testimony of H. A. Hinkle.)

is a prime hop.

A. A prime hop is a grade lower than the choice. It need not be so fat nor quite so bright, but it must be free from mold. It can be a little harsher, a little coarser in feeling.

Q. Well, then, a prime hop, in your opinion, need not have any mold in it?

A. No, sir.

Q. And must be bright in color?

A. Yes, sir.

Q. And it has got to be flaky?

A. Yes, sir.

Q. And you say not quite so fat. Now, what do you mean by that?

A. Not quite so much lupuline in it.

Q. What is the lupuline in a hop?

A. It is the pollen on the inside. It is the powder substance of a hop.

Q. Now, that is really the substance?

A. The main qualifications of a hop.

Q. Then, about the only distinction I can get from you as to the difference between a choice hop and a prime hop is a slight difference in the tone of color—not quite so fat?

A. No, it is not a matter of color. It is the same thing that could be with any other vegetation. Might take it in lines of potatoes and things like that. A choice potato, or a second grade potato—it is the same thing in hops.

(Testimony of H. A. Hinkle.)

Q. A prime hop, you would say, must have a good color?

A. Yes.

Q. Good, even color?

A. Yes, sir.

Q. And a choice hop, you would say, must have a good, even color?

A. Yes, sir.

Q. But you mean that a choice hop must have an extraordinarily fine color?

A. Yes, sir.

Q. And luster about it?

A. Silky.

Q. Silky color?

A. Yes, sir.

Q. Now you claim that some of these hops were not fully matured?

A. Yes, sir.

Q. What formed your judgment on that?

A. Because they are thin.

Q. Well, that is just another phrase.

A. All right, there is nothing inside of them, then. They are immature. There is no lupuline or resin in it, as you call it, in the hop.

Q. Now, if a chemical analysis of these same hops would show that the resin in that hop was more than a good average hop, would you say that it was fully matured or not matured?

A. Well, those hops were not fully matured.

(Testimony of H. A. Hinkle.)

Q. You would put your opinion on a mere examination up against a chemical analysis, would you?

A. I would on those hops, yes, sir.

Q. Now, you found some of those hops, you say, were slack dried?

A. Yes, sir.

Q. Now, what do you mean by that?

A. Why, they didn't dry them long enough. They put them in green, before they were entirely dry. And a hop that is slack will sour and perish.

Q. How long will it take it to sour, if it is slack dried?

A. That depends on climatic conditions a good deal, and how slack it might be. We found two bales that was perished in this lot.

Q. Now, doesn't it happen sometimes that when a hop in appearance might not have been dried quite enough, it would in fact dry out in the bale?

A. That depends on the kind of a place they would store it in.

Q. Well, now, as a matter of fact, don't you gentlemen that inspect hops disagree as to about how much drying is necessary to maintain a hop in the bale?

A. I don't think so necessarily.

Q. Well, don't you know that you do have difference of opinion as to whether a hop will keep or not?

A. Sometimes.

(Testimony of H. A. Hinkle.)

Q. So it is not a matter of certain judgment, but it is a mere matter of opinion?

A. Not necessarily; because a slack hop is something that you never can tell what it will do.

Q. Now, just describe how the cone of a hop should appear in the kiln to be sufficiently dried.

A. It should feel perfectly dry and the stem should be so you could break it.

Q. It should be so it is brittle?

A. Yes.

Q. Don't you know, as a matter of fact, that when the burr or stem of the burr is slightly tough, it is sufficiently dry?

A. Not always.

Q. Well, when would it be sufficient, if not always?

A. That would be under conditions of whether they was baling immediately or whether they expected to leave them in the store room a while.

Q. So it depends on a variety of circumstances as to whether the hop was sufficiently dry?

A. Yes.

Q. Now, you found only 29 bales of the hops that in your opinion was slack dried?

A. There were 29 bales slack. Two bales of it was perished, besides those twenty-nine.

Q. Very well. That left something like 170 bales that were not slack dried, didn't it?

A. Yes, sir; whatever it would—184.

(Testimony of H. A. Hinkle.)

Q. So then your real objection to these hops was the color?

A. The quality of them.

Q. Well, the color and the mold.

A. Yes, sir; and the flavor.

Q. Well, now, which was most important—the mold or the flavor?

A. Well, naturally moldy hops as a rule are of poor flavor. A hop that contains mold cannot be of the quality of a—not even a prime quality.

Q. Now, didn't you say to Mr. Edmunson at the time you were there examining these hops, that if these hops would come up to prime, that you would take them?

A. I think I did, yes.

Q. Now, you describe to the jury what constitutes mold in a hop.

A. It is a fungus that comes into hops from a vermin damage and causes the hop—if you leave them long enough they decay or rot on the vines. And of course when they dry them that shows. They become black on the inside, and that is a detriment for brewing purposes.

Q. If these hops were a fully matured hop and they had some mold in them, would that affect the quality of the hop for brewing purposes?

A. Yes, sir.

Q. Why?

A. Well, they claim that the mold causes some

(Testimony of H. A. Hinkle.)

trouble with your yeast, for brewing purposes.

Q. And you say they could not use them at all?

A. I am not saying that.

Q. Now, what causes that mold?

A. Vermin damage from vermin and lice.

Q. Well, the lice or the louse crawls inside of the burr, does it not?

A. I think so.

Q. And dies?

A. Yes, sir.

Q. Now, if it is in the outside of the burr and dies, does it cause any damage?

A. If it died on the outside of the burr?

Q. No; inside the first leaf or two.

A. I think so, yes.

Q. Even then it would cause damage?

A. Yes, sir, because it continues to decay.

Q. But if the burr is not decayed before it is dried, what effect would that have on it?

A. As a rule, they are not on the outside leaf. They are further in where they are moldy. That might be what you would call a trace of mold, where you just see a little speck on the outside leaf.

Q. Well, did you find a trace of mold in these hops?

A. Some of them was very moldy.

Q. Which ones were very moldy?

A. There was more mold in the 80 bales than in the 104. They all contained more or less mold.

(Testimony of H. A. Hinkle.)

RE-DIRECT EXAMINATION

Q. Mr. Hinkle, the quality described in the contract is as follows: "Of sound condition, good and even color, fully matured but not over-ripe, flaky, cleanly picked, properly dried and cured, free from sweepings and other foreign matter, and not affected by spraying or vermin damage." If the hop is free from those defects, what kind of flavor will it have?

A. Good flavor.

Q. Now, in testing hops, where there is a bad flavor or a vinegary flavor, what does that show in the hop?

A. Well, an immature hop will show a poor flavor, or the flavor can be damaged from smoke or from improperly drying—firing. And a hop that is over-dried also has a poor flavor. It shows a sweetish flavor.

Q. What is the purpose of an inspector in testing the flavor of a hop?

A. Well, it is to find out the grade of the hop to a certain extent—that is a great deal we go by.

Q. What does a poor flavor or a vinegary flavor in the hop show?

A. Poor flavor, that it is immature or something of that kind. It can be caused from different things; but as a rule the immature hops has got a poor flavor or sweated hops, stewed hops will have a poor flavor.

Q. The purpose of testing the flavor is simply to test whether or not these defects are present, as I

(Testimony of H. A. Hinkle.)

understand?

A. Yes, sir, that is the idea.

RE-CROSS EXAMINATION

Q. Now, that soured or vinegary flavor you are talking about usually appears in slack-dried hops, doesn't it?

A. A sour hop is of a slack type, yes.

Q. What was the flavor you said these hops had?

A. Some of them were sour; others were of immature flavor.

Q. Which particular ones were sour?

A. The slack-dried hops.

Q. That is the 29 bales?

A. And the two bales, yes, sir.

Q. And which now had the bad flavor from an immature hop?

A. Well, all of them were affected with the poor flavor.

Q. The 104 bales and the 80?

A. Yes, sir.

Q. But that was not the stewed effect?

A. They had a stewed effect, flavor, yes, sir.

Q. I thought you said that usually occurred in a slack-dried hop?

A. No, the sour flavor from a slack-dried hop.

Q. (Juror.) How do you test for the flavor?

A. With your nose. Use your nose.

Excused.

(Testimony of Hal V. Bolam.)

Hal V. Bolam, called as a witness on behalf of plaintiff, being first duly sworn, testified in substance as follows:

He resides at present in Portland, Oregon, and during 1912 he worked for T. A. Livesley & Company, Salem, Oregon. He has been a hop buyer and inspector for twenty years, and been in the hop business twenty-six years; was in the hop business first in London, England, and various parts of the continent of Europe from 1896 to 1908; 1908 came to the Pacific Coast, and have ever since resided in Salem and Portland, Oregon, and has bought hops and inspected hops in Oregon, Washington and California. He is now employed by the Wolf Hop Company, Portland, Oregon. That T. A. Livesley & Company received four samples of hops from the J. M. Edmunson yard at Goshen in 1912, and that he examined and inspected the samples, and found them dull in color. Three of the samples contained considerable mold, one not so much. The picking was fair to average picking. The hop was immature, lacking in good lupuline, flavor was poor, either from faulty curing, and partly probably from the immature nature of the hop. That a poor flavor results partly from an immature hop, a hop that is not ripened properly on the vine. A flavor can also be spoiled in the curing process. A hop is a very, very delicate fruit, and needs expert and delicate handling, otherwise it is easily spoiled. It must be picked at the

(Testimony of Hal V. Bolam.)

proper time and properly cured, otherwise the flavor will suffer.

Three of the four samples contained considerable black mold. The fourth not quite so much, but it contained mold, and would grade as a medium hop. The grades of hops being choice the best grade; prime the next standard; medium; then you come down to common or trashy grades. Trashy would mean a very poor quality hop. Mr. Edmunson sent us samples himself, in order that we could see what he had, and possibly buy those hops if we could use them. The samples were sent us in the month of February, 1913.

Being asked to state the purpose in testing the flavor of the hop, answered: "Well, I would explain it this way: You take out some hops from the sample and rub them up in your hands and get the flavor; flavor and appearance go very much together. If a hop looks good, it smells good; if it looks bad, generally the flavor is bad also. The brewers when they are buying hops demand a correct hop. If they are buying a choice quality hop, they want a hop that is rich in flavor. It must have that nice, fine, sweet, rich, pungent flavor. You pull a handful of hops out of the bale, and you immediately put it to your nose; that may be for two purposes, the first thing is to determine the curing of that particular bale of hops. You are not particularly testing it for choice flavor. You want to know whether that bale of hops

(Testimony of Hal V. Bolam.)

at that particular time is a sound bale of hops and will keep; whether that bale of hops at that time is sound, properly cured. You examine it then for color, freedom from mold, and so on.

The paragraph defining the quality of hops was read to him, and he was asked: "A hop minus all of these defects would have what kind of a flavor?"

A. Positively must have a good flavor. You test the flavor. If the flavor is bad, that hop must have some defect in some manner, shape or form, and it is up to you then to determine what that defect is. A hop minus all these defects would be a first quality or choice hop. A hop minus all these defects should be brilliant in color, velvety in texture, sweet and pungent in flavor, in other words be a choice hop. The hop samples sent in by Mr. Edmunson, and the ones I examined in Eugene, were as I have described them. Were dull in color, they had a stewed appearance, the flavor was poor and they contained mold.

On cross examination, Mr. Bolam testified he found mold in all the four samples of hops sent by Mr. Edmunson, but in one was less pronounced than the other. There was sufficient mold to take it away from any class except that of ordinary medium hop.

Q. Would a little mold take the hops out of the prime class?

A. Well, it would have to be very little indeed.

Asked to define a prime hop, he said: "A prime

(Testimony of Hal V. Bolam.)

hop, while not so rich and velvety in texture as a choice hop, should nevertheless contain a certain brightness and certain richness of cut and reasonably clean picking, and good flavor. It might contain a very small element of mold; but if there is much bad mold it is not a prime hop.

Witness was asked if he was not a witness in the previous trial of this cause and if he did not testify in answer to the question, what other defect, and answered a little mold in my sample, which I did not know myself; were sent to me by Mr. Edmunson. There was not a very great amount of mold. Now, is that correct?

A. Well, that would probably be correct, yes.

Q. But the hop was not a fully matured hop?

A. No, it was not fully matured. By appearance of the samples, the buds of the hops were not fully grown out. A hop may not be large, but it must contain lupuline. The lupuline is the pollen, which you find in the center of the hop cone. There is a powder or pollen in the center of the cone of the hop.

Q. Now, you look at that and judge or make your estimate as a matter of opinion as to the amount of lupuline that hop has?

A. Yes.

Q. And your judgment is now that these hops did not have sufficient lupuline to make them a mature hop?

(Testimony of Hal V. Bolam.)

A. Yes.

Q. Now, if those hops were analyzed by a chemist and found to have the usual amount of resin or lupuline in the best grade hop, would you still say it was an immature hop?

A. I would stand by my judgment, sir; yes, sir.

Q. In other words, you would put your opinion as a hop expert against the analysis of the chemist?

A. Yes; on the samples which I saw, certainly.

Q. Now, in a prime hop, as to the color, what kind of a color must a prime hop have?

A. Well, whether green or yellow, sir, is immaterial; but it must have certain brightness to it. Hops are very much like looking at fruit. You can tell if you look at a box of apples or a box of tomatoes.

Q. Well, you would say, then, a prime hop must have a good, even color?

A. Yes, certainly.

Q. Sure; but then that color might be extraordinarily brilliant and bright and make it a choice hop, might it not?

A. Yes.

Q. And it still might be richer and make it an extra fine choice hop?

A. Yes, sir.

Q. Now, isn't there such a grade as an extra choice hop?

A. Well, there is a very, very technical grade

(Testimony of Hal V. Bolam.)

they call a fancy hop, but it is not a trade term at all. We hardly ever use it any more.

Q. Well, there are instances of a hop being graded that way?

A. Well, you could say a first quality hop is a fancy hop. Nothing could be better than first quality.

Q. You call a first quality hop the very best, do you?

A. Certainly. You can't get anything better than first quality.

Q. But if in a description of first quality it says a good quality or a good color, do you have to have all that brilliancy about it?

A. Yes, you must have brilliant color to make a first quality hop.

Q. Yes, I know. But you said a prime hop was, all that was necessary was to have a good and even color.

A. Yes, a certain brightness with it.

Q. Sure, a certain brightness about it.

A. Yes. I didn't say either, Mr. Slater, that that is all that is necessary to make a prime hop.

Q. I am just talking about color now.

A. Yes, that is right now. That is right in color.

Q. But the distinction as to color between a choice hop and a prime hop is the degree of brightness, isn't it?

(Testimony of Hal V. Bolam.)

A. Yes.

Q. Now, doesn't a medium hop have to have that good and even color, too?

A. Yes, but it is a little less bright than a prime hop. It is a matter for the eye.

Q. So it is just a degree of brightness that distinguishes between these different grades?

A. Different colors.

Q. Yes?

A. Yes.

Q. So a medium hop could be a hop of good and even color, too?

A. Yes; but not as bright as a prime; nor is a prime as bright as a choice.

Q. Now, that is all the defects you found in these hops?

A. Yes, sir.

RE-DIRECT EXAMINATION

Q. What makes the difference between grades of color, Hal, in hops?

A. Well, a choice hop is a hop that has had the ideal amount of care in cultivating. It must have been thoroughly cultivated, properly sprayed at the right time, cleanly picked at harvest time, properly dried on the kilns, and properly baled afterwards.

Q. Now, that gives color?

A. Yes; that gives everything. Color and quality really go very largely together.

In October, 1912, choice hops were being pur-

(Testimony of Hal V. Bolam.)

chased from growers at from 19 to about 20½ to 21 cents. Prime hops were being purchased from growers from 17 to 18 cents; 16 to 18 cents would be a fair price; the medium hops were around 14 cents a pound. According to my recollection, these prices prevailed up to the 30th day of October.

Q. Don't you know, as a matter of fact, that as soon as the market opened it began to decline?

A. No, it didn't decline on choice hops.

According to the best of my recollection, the market began to decline along in November, when the demand slackened; up to then there was a very active demand through the latter part of September and the month of October for a good quality hop.

Harry L. Hart, being called as a witness on behalf of plaintiff, being duly sworn, testified in substance as follows:

That he has resided in Portland fifteen or sixteen years; is in the hop buying business and was in that business in 1912. Got samples of the hops grown on the J. M. Edmunson yards in 1912. Examined all that came to the office. There were three distinct sets of samples. The first was sent by Mr. Edmunson by mail or express shortly after harvest, another line of samples was drawn later, possibly in October or November, and a third line was taken out in March, when witness bought the hops, shipping samples.

Being asked to state to the jury what the defects

(Testimony of Harry L. Hart.)

of the hops were, testified: The color was not the very brightest, was not even in color; there was a certain amount of mottled color, what we call mottled or unevenness, and a trace of mold. They didn't grade the highest quality as a result of the fact that they were not perfect in color and the other requirements which go to make a top grade of hop. As near as I can recollect, we called them about a medium, some of them were not good medium, some of them were good medium. They were not all the same. The entire lot varied from an extreme low grade, we will say of poor medium, to an extreme high grade of good medium or thereabouts. When we shipped the hops we graded them into two distinct lots. We bought them at two distinct prices. We don't, in buying hops, just set down in our minds the grade. We go by matched samples as we sell them. It is so long ago that I do not know that I can tell you just the number of bales. I think perhaps half of them were poor mediums, and half of them were good mediums; in a general way, that may not be exact as to a bale.

The price is established absolutely by the quality. The percentage of difference between the best and the poorest or any intermediate grade might vary with the season, but in no case would a hop that was medium bring as much as a hop that was choice or prime.

Well, choice would be the best quality, and prime

(Testimony of Harry L. Hart.)

would be the next best, and there was a difference of say two cents, about two cents, in October, 1912, and between prime and medium were three cents. The buying at that time was confined very largely to the better grades, which made them worth perhaps a little more or the others worth a little less, or both, so that the difference was wider than might be the case under some other conditions. The latter end of October is the only part of the month that I have refreshed my memory on, referring to October, 1912. The latter end of the month choice hops brought 20 cents, and in some cases a little better. The market could be considered about 20 cent basis, average market.

Mr. Edmunson has made a practice of sending samples for some years. It is some distance down there, and to get the samples in to the trade. I think he used to send other people samples by mail, not wait for me to pull sample out, but pull them out and send them to me. The purpose of sending samples was to procure bids on hops, I presume, that is what it usually resulted in at least. The samples were sent as late as the middle or last part of October. That is more or less a guess, I don't remember that.

On cross examination by Mr. Slater, witness testified: That he bought the hops some time in March, 1913; that Mr. Wood, who is with him, inspected the hops, and the testimony of the witness was based on the samples which were brought in. Witness was

(Testimony of Harry L. Hart.)

asked: Now, as a matter of fact, Mr. Hart, when you were negotiating to buy these hops from Mr. Edmunson, didn't you tell him over the phone that these were prime hops?

A. I don't recall telling him that.

Q. Didn't you tell him that they would grade as prime hops, or something of that substance?

A. I am quite sure I did not.

Q. What defects did you say you found in these hops?

A. To the best of my recollection, it was unevenness and rather a dullish color and a little mold.

Q. What was the general character of the hop, green or yellow?

A. Greenish to greenish yellow, I think would cover it.

Q. You could not pronounce them an immature hop could you?

A. I don't remember them close enough to say they were either one or the other. I don't imagine they were particularly mature, on account of the fact they were rather greenish in color. But I not positive that they were immature hops. I am not positive that they were immature hops, from my memory.

Q. Well, could you say that they were a bad color?

A. They were a dull color.

Q. Well, but could you say they were a bad

(Testimony of Harry L. Hart.)

color?

A. Well, they were not a good color. They could not be a good color and be dull.

Q. They were not?

A. No.

Q. Could they be a reasonably good color?

A. They were a dullish color, Mr. Slater. It is a long time ago to remember the exact distinction.

Q. Well, now, when you say they were a dullish color, you are thinking of a bright, velvety color that you think of as a choice hop, aren't you?

A. That is the basis on which we establish our grading. We took the choice hops and grade from that down; not the poor ones and grade from that up.

Q. When you are grading hops as a choice hop, you must have a bright, uniform, velvety color?

A. Yes, to be a choice hop, it must have those features.

Q. And this contract that is sued on says, "A good and even color." Now, could you say that the color of these hops was a reasonably good color?

A. They were dullish; therefore, I could not say they were a good color. They were more or less mottled; so that I could not say they were an even color; they were not a good color compared to a choice hop, where they might have been considered a very fair color compared with a common hop, which is a still lower grade again. It is all by com-

(Testimony of Harry L. Hart.)

parison, you see. A prime hop must have a good color, too; perhaps not so good a color as a choice.

Q. A choice hop must have a veyr good color,

Q. A choice hop must have a very good color,

A. Hops are graded on other features besides color.

Q. I know; but I am just talking about color.

A. Well, I should say that a choice hop would be very bright in color.

Q. Yes; very good.

A. As bright as any that were raised that year.

Q. The best color that you can find a choice hop?

A. Yes, sir; well, the best of that year's crop at least.

Q. When we are talking about a prime hop, it must have what is called a good color, but not so bright or excellent as a choice hop?

A. Well, it might have just as bright a color as the choice, and have some other defect and then be graded prime.

Q. But suppose that was the only difference between the hops, was a question of color?

A. If that were the only difference, I should say a choice hop would be bright and silky and even in color, and a prime hop not quite so bright. That, I think, would cover it, if you are grading on color alone.

Q. But could you say that the color of this hop

(Testimony of Harry L. Hart.)

was not a good color, as language is ordinarily used?

A. I think I would say that, yes, sir.

Q. How much did you pay Mr. Edmunson for these hops?

A. Paid him 14 cents for 103 bales, and 10 cents for 103 bales, and there was a little—six or seven bales of very poor hops that we bought for eight cents.

Q. Well, now, what caused that extraordinary difference between the 14 cents quality and the 10 cents quality?

A. Well, it was a question of color and mold, chiefly, in those hops, as near as I can recall.

Q. Now, didn't you, in the first instance, agree to pay Mr. Edmunson 14 cents for all those hops excepting the few bales that were very bad?

A. No, I didn't. The deal was actually closed by Mr. Wood: I think the deal, as near as I can remember, was closed in Eugene by Mr. Wood. Mr. Edmunson and I talked on the telephone about it. My recollection is that Mr. Wood closed it.

Q. You testified that you didn't buy those hops as any particular grade?

A. No; we bought the hops on samples, Mr. Slater.

Q. What do you mean by that?

A. Well, on samples which had been drawn from the bales, and we agreed to pay 14 cents for all the hops which ran like the better end of the sam-

(Testimony of Harry L. Hart.)

ples, and 10 cents for all the hops which ran like the poorer end of the samples. There was quite a bunch of samples we had out of them. There was no way of detecting it unless we examined each bale by itself.

Q. When you sell hops, do you sell them on quality of choice, prime and medium?

A. Not in the bale; not at that time of year, very, very rarely.

Q. How did you sell them?

A. Sell them on samples.

Q. You sold these on samples.

A. Yes, but not the identical lot, I don't believe. Not the identical sample. We sell very frequently to match the samples.

Q. You had a sample from some buying house you were asked to match?

A. Yes.

Q. You sold these on that sample?

A. Yes.

Q. You shipped these hops to London, didn't you?

A. Yes.

Q. All these hops went on one sample?

A. No; no, they didn't.

Q. On your sale?

A. I don't think so. I didn't look that up, but I am quite convinced that they went on two distinct orders.

(Testimony of Harry L. Hart.)

Q. As a matter of fact, didn't you sell all these hops on one sample?

A. No, I think not, Mr. Slater.

Q. You don't know that you didn't?

A. I would not say that I did or didn't; but I am very much inclined to think I didn't, because the difference in the quality was too great for them to go on one sale at one price.

Q. They were export hops, weren't they?

A. They were exported.

Q. Well, now, isn't it generally known in the hop trade that export hops are of the best quality?

A. Not any more, no, sir.

Q. Not any more?

A. That expression used to be used years and years ago. And export quality at that time was considered the best, because England usually then only bought the best. But I think it is safe to say now that they take as many poor ones as they do good ones, and have for years.

Q. How long has that practice been in vogue of taking any quality?

A. Well, I have shipped hops to London for ten years, eleven years, and during all of that period we could sell poor ones at a price about as readily as good ones, if the price were tempting enough.

Witness was cross examined for the purpose of showing that he was friendly to the plaintiff, and admitted that he was; that his office was next to theirs

(Testimony of Harry L. Hart.)

at the time the contract was made; that he bought the hops, and Mr. Wood issued a draft for the same; that he stopped payment thereon at the instance of the plaintiff; that he knew they were financially interested in the hops; that if he paid the draft and they showed their interest he might have to pay it again, or part of it. That it was generally known that they had a contract for these hops, and that knowing that went ahead and made the purchase of the state. That he offered to ship the hops back to Mr. Edmunson for the purpose of protecting himself, but that the offer was not accepted. That pay- and got possession of the hops and shipped them out ment was stopped on the draft and the money was turned over to the Clerk of the Circuit Court at Eugene, Oregon, and with reference to the price of hops said that in October, 1912, hops of the grade of these hops would have been worth 16 or possibly 17 cents.

A. R. Zeller, being called as a witness, testified in behalf of plaintiff, after being duly sworn, in substance as follows:

I have been in the hop business for 19 years, and worked for Klaber, Wolf & Netter in 1912, and was running the office in Portland at the time the contract was made with Mr. Edmunson. Mr. Wolf came up in the fall of 1912 and was here with me.

Received six or seven samples of the Edmunson hops in the fall of 1912 and examined them. The

(Testimony of A. R. Zeller.)

hops were dull, brownish color, somewhat immature, and had mold in them to quite a considerable extent. I graded the hops at the time about a poor medium and a good medium on the samples received. The hops were not worth near the money that a choice hop would be worth. These particular hops there was mold in them; they were a dull color, the flavor was poor, the picking was fair, and were not worth as much money as the best hops. The first quality hops in October, 1912, ranged from 19 to 20½ cents; hops of the grade that these were ranged in October, 1912, around 15 to 16 cents, and the grade above would be 17 to 18 cents.

I have known Mr. Edmunson for ten or fifteen years; he was our agent at Eugene for some time; been pretty friendly with him all the time, he bought hops for us down there.

We had contracts for the resale of hops that we bought at contract that year. I instructed Mr. Hinkle to go down there and inspect the hops. If they was up to contract to take them in and pay for them.

CROSS EXAMINATION

Questions by Mr. Slater:

Q. Did you instruct him to be strict upon the judgment of the hops?

A. I always am that way.

Q. What?

A. I always am.

Q. Well, now, when the market price is much

(Testimony of A. R. Zeller.)

below the contract price, you instruct him to be very exact, don't you?

A. No more so than I would be if they were the same price. I want to know what the hops are when ever he goes down to inspect them.

Q. As a matter of fact, as it was in years like 1912, when the market price has gone down, is your firm not more exact in examining hops than you are when the market price is away above the contract price?

A. I don't think so; no, sir.

Q. It doesn't make any difference with your people?

A. No, sir, it does not.

Q. Now, what did you say was the defect in these hops?

A. Mold, dull color, immature.

Q. To what extent was the mold in the hops?

A. Some of the samples showed more than the others. There was quite a good deal of mold in some of them, and not so much in some of the other samples.

Q. Well, how many samples, or how many bales do you know had a good deal of mold in them?

A. To the best of my recollection, I saw 12 or 15 samples, somewhere along there. There was probably half of them that had considerable mold, and a half of them was some mold in.

Q. Very little mold?

(Testimony of A. R. Zeller.)

A. No, I said some.

Q. Some?

A. Yes.

Q. Well, now, wasn't it very little mold, if any?

A. No, some.

Q. Well, I know. Cannot you make a better estimate than some mold?

A. It is quite a lot over what a little mold would call for in our line of business.

Q. You say they were dull in color?

A. Yes, sir.

Q. What was the color of them?

A. Dullish. Samples I saw of them ran dullish brown; that is, brown buds mixed through them. Some was on the greenish; some greenish to yellow; but there was dull buds mixed all the way through.

Q. Well, now, did all the samples show that?

A. All that I saw, yes.

Q. Are those all the defects now that you found in the hops?

A. The flavor was poor.

Q. What kind of flavor did they have?

A. Stewed; with the exception of one sample. It was a little on the slackish order.

Q. What did you say the price of hops was on the 31st day of October, 1912?

A. What grade?

Q. Choice hops?

A. Nineteen to twenty and one-half cents.

(Testimony of A. R. Zeller.)

Q. What was the market price at that time of prime hops?

A. From 17 to 18.

Q. What was the market price of choice hops in 1913, March?

A. There was not any here.

Q. What was the price of prime hops the first of March, 1913?

A. Around 16 to 17 cents. They might have been down maybe to 15, 15½ to 17.

Q. What was the price of medium hops at that time?

A. About probably 12 and 14.

Q. Now, Mr. Zeller, when you examined these hops, you didn't find anything good about them at all, did you?

A. I don't think there was very much. I was not complaining much about the picking. That is the only thing that I didn't complain about.

Q. But they were no good at all, in your judgment?

A. They were good for something, yes. I am speaking now of good hops, though.

Q. Well, you wouldn't call them trash, would you?

A. No, sir.

Q. How does the mold effect a hop?

A. It lowers the quality of the hop if it has mold in it.

(Testimony of A. R. Zeller.)

Q. Well, now, a trace of mold, or a little mold in a hop sample, would not be noticed by some people, would it?

A. Yes, sir; I think it would be noticed by anybody.

COURT:—How do you discover the mold—under a glass?

A. You can see it with your eye. It has little black specks in it.

Q. Now, you say you take a sample of hop and there is a little mold in it. You say that will affect the hop. And then you take another sample, and there is some mold in it, but not enough to hurt it. Now, how do you judge those matters?

A. Well, you have simply got to size up the amount of mold that is in the hop. You can look at the hop itself and see how much mold is in it. You can take and size up how much is in it at the time.

Q. Have you ever known of an instance where one expert passes on hops and gives his judgment, and another expert gives a different judgment?

A. It might be, and show difference between their judgments.

Q. Did you ever know of a case where hops were rejected as prime hops, and they were afterwards sold as choice?

A. No, sir, I did not.

Q. You never knew of that? Did you ever know of a case where hops were contracted primes

(Testimony of A. R. Zeller.)

and rejected as mediums, but were sold as primes afterwards?

A. It might have gone in at a higher price, but I don't think the quality would ever have got up to a prime on them.

Q. Well, doesn't the state of the market affect the judgment of experts on those questions?

A. Not as far as quality goes.

Q. If the market happens to be advancing and booming, isn't it a fact, now, that the experts are more liberal in their judgment as to the quality of hops?

A. I don't think they are in the quality, no. They might be willing to take a little lower quality of hop at the same money, figuring that it is going up; but their judgment on the quality of the hop is just the same as it ever was. I don't think we ever vary on that.

RE-DIRECT EXAMINATION

Q. Counsel asked you if your instruction to the inspectors didn't vary from year to year. And you answered it didn't; that it didn't vary even when the price was up. Now, why doesn't it vary?

A. I want to know myself exactly what is in those hops. Consequently, I want the inspector to go through just as rigidly when the market is up or down, so that he will report to me what is in those hops.

(Testimony of A. R. Zeller.)

RE-CROSS EXAMINATION

Q. Now, isn't the main question that controls you and your men in making inspection the market price, as to whether the hops should be taken under the contract or not?

A. Do you mean if the market is down underneath the contract?

Q. No; supposing the market had been 10 cents higher than the contract price, as a matter of fact, wouldn't you have taken those hops in?

A. We certainly would, yes.

Q. Sure. Now, why?

A. We had to do it to protect ourselves on the loss that we had on the sale of those hops.

Q. There would not be any loss.

A. They certainly would be a loss to us if we had these hops sold.

Q. The fact is, in a circumstance of that kind, you can make money by taking the hops in, isn't it?

A. No, we would have lost money. We would have had to went out and bought other choice hops to fill the sale.

Q. That is in case you had contracted to sell these particular hops as choice hops?

A. Yes.

Q. Well, how did you know that you contracted to buy choice hops?

A. It is what the contract calls for.

Q. Does the contract say choice hops?

(Testimony of A. R. Zeller.)

A. First quality, which means choice.

Q. That is your judgment?

A. Yes, sir.

Q. But the contract does not describe particularly or expressly choice hops, does it?

A. It certainly does, yes, sir.

Q. It is only your judgment that it does?

A. Yes, sir.

G. H. Irvin, called on behalf of plaintiff, being duly sworn, testified in substance as follows:

Residence, Portland, Oregon, for about 11 years; in the hop business about 15 years; in that business in 1912, and working for H. L. Hart; worked for him in 1913; assisted in inspecting the hops purchased from Mr. Edmunson, and assisted Mr. Wood in inspecting all of them. Divided the hops, from the inspection, into the different grades. Of the best quality, there was in the neighborhood of 80 bales. We endeavored to divide them into two carload lots, making two cars approximately the same size. Finally picked out the better of the second grade, you might call them, enough to make 103 bales. The 80 bales of the best grade had defects, but we were not inspecting particularly against these defects. We were inspecting according to samples we had. There was mold in them, scattering mold throughout, possibly the entire crop, run through the 80 bales and through the entire crop. We found mold in all of those. There was none of them a particularly attrac-

(Testimony of G. H. Irvin.)

tive color. They were a greenish hop. Some would probably claim that they were immature burrs in them. The hop was probably picked a little bit early. The immature burrs run all through the crop. The bales were not even all the way through, we ascertained that by inspecting every bale, and comparing them, carrying them out where we had a good light, and looking for the difference as to color and as to flavor. Inspected some of the bales on both sides, some of them would be fairly good on one side, and on the other side would be some of the poor goods in it.

October, 1912, the best grade of hops were worth around 20 cents—19, 20 or 21 cents. Primes would go around 18 or 19 cents; mediums were around 16 and 16½ cents. We bought some at 15 cents.

In answer to the question: Who was it fixed the price of these hops with Mr. Edmunson, witness answered:

A. We wired for prices on them and secured an offer, and then we submitted that to Mr. Edmunson. And I don't think—I think we wired back a second time to try to get a raise, something to that effect. It was a mutual agreement between, virtually between Mr. Edmunson and the original buyer through our office.

Q. Do you know how many pounds were in the carload of 103 bales that contained the 80 bales of the better grade of those hops?

(Testimony of G. H. Irvin.)

A. I cannot tell you the exact weight, no; I don't remember that; I have got it.

Q. Approximately?

A. I suppose 19,000 pounds or a little more. Between 19,000—

Q. A little more than 19,000 pounds?

A. Yes, something more than 19,000 pounds.

Q. That was for the 103 bales that went into the car?

A. Yes. Well, both lots didn't vary much. There was not much difference between either of them. Of course, there were six bales on the side that didn't enter into this.

CROSS EXAMINATION

By Mr. Slater:

I didn't say we found the color off. I say we inspected according to the samples we had. The color was not attractive in any of them. Some of them were of poorer color or lesser color than the others. When we inspected the hops we expressed an opinion on the color to this extent, that some were not quite as bright as others, some of them showed discoloration from sweating. The hops were all shipped to one person. A distinction was made in the shipment as to quality. I do not remember as to whether they sold on one sample or not. They were only sold on one sample as far as selling was concerned. All went on one sample, practically so.

(Testimony of G. H. Irvin.)

RE-DIRECT EXAMINATION

Q. If they were sold on one sample, Mr. Irwin, how does it come there were two prices?

A. From the fact that some of them were not as good as this sample we sold on, in order for them to take them, why, there was a difference made in prices. That is generally the case and is often done. You cannot buy a lot of hops, that is, you are not sure of buying a lot of hops on one particular sample, have the crop running to that particular sample. If you take the crop you are supposed to get a concession on it according to their value. But I would not swear positively it is only one sample. That is my recollection. It may be two samples. I could look it up and find out.

RE-CROSS EXAMINATION

Q. Didn't you testify at the trial at Eugene they were sold on one sample?

A. I can't remember. I don't remember.

Q. I will ask you if this is not your testimony: "Do you know how they were shipped? Was there any distinction you made when you shipped the bunch? A. None at all so far as outward appearances were concerned." Is that correct?

A. That is correct.

Q. And this: "That is not the question I am asking you. When you shipped these hops, weren't they all shipped the same way?" "Yes." "As the same kind of hops?" "As the same kind of hops."

(Testimony of G. H. Irvin.)

“Is that correct?” “A. Yes.”

A. Yes.

EXAMINATION BY JUROR

Q. Do I understand this gentleman to testify that these hops were bought by Mr. Hart through an agreement with the grower and the contractor? I understand his testimony that way.

A. No. Shall I explain to him?

COURT:—Answer the question of the Juror.

A. As I attempted to answer here: They tried to ascertain how we arrived at the price. That was the way I endeavored to answer the question.

Q. Oh, one price?

A. One price. How did we get the offer for these hops? Well, we wired and asked them to make us an offer. You see, our people in London—they make us an offer; then we go and try to buy from Mr. Edmunson. If we are not successful in buying at that price, and we have to pay half a cent more, we will wire back, tell them we cannot buy at that price, we will have to pay half a cent more.

Q. You mean the contractor you sold to?

A. At the time I made the purchase—that is what I have reference to. I had nothing to do with the contract in dispute.

Q. My understanding of the testimony was, that you testified that you had a conversation with Wolf of that company, to ascertain the price.

A. No, no; not Mr. Wolf.

(Testimony of G. H. Irvin.)

Q. Well, then, it was your own contractor?

A. It was our own people in London that we were doing business with. That is the way we ascertain. As I understood, he wanted to know how we got this price. That is, how we arrived at the price.

Q. I misunderstood your testimony. It would make quite a difference.

Mr. Slater:—I would like to ask a question.

COURT:—Very well.

RE-CROSS EXAMINATION—Resumed.

Q. When you were negotiating with the ultimate buyer in London, did they have a sample of these hops on which your telegrams were based?

A. I don't remember whether it was this identical crop, or whether it was a crop of similar quality.

Q. You generally do that upon a sample of another crop, which is referred to by number, isn't it?

A. Yes, sir.

Q. And you try to match that sample?

A. We do, yes, sir.

Excused.

Adjourned until 10:00 A. M.

James Hayes, called as a witness on behalf of plaintiff, being duly sworn, testified in substance as follows:

I reside at Eugene, and have resided about twenty-five or thirty years in Lane County. Am a hop grower and buyer; in that business about fifteen

(Testimony of James Hayes.)

years, I guess. In that business in 1912, working for Klaber, Wolf & Netter, as a local buyer. Was with Mr. Hinkle, when he went to inspect the Edmunson hops; was with him when he went out the first time. The first time we went out there we went out to go through the hops, and they were piled up in the warehouse and the warehouse man was gone, nobody to help us line them up, so we cut out a few samples and examined them is about all we did that day. I heard Mr. Hinkle say to John, or ask him, if he had any better hops than those. First John said he didn't believe he did, and then afterwards he said he thought he did have. The samples were poor color and mold in them. In place of being a bright color, they were rather a copper color, dull color, sort of mottled. I am under the impression now that John selected the bales from which these samples were taken, because the idea was to find out, to get the best, if there was any there, or get a line on them, and I think John would tumble over a bale and look at it, and probably go to another, but I don't remember positively about that. The fact that the hops were uneven in color, and of a poor color and had mold in them was called to John's attention at the time. He didn't say much of anything about it.

Q. Did he dispute it?

A. I could not say that he did.

Q. Could you say that he didn't?

(Testimony of James Hayes.)

A. Yes, he didn't. He didn't dispute it, any more than after examining the samples he thought he had some better hops in the pile.

Q. He didn't dispute the fact that these two samples or what samples you had there, had mold in them?

A. No, sir, anybody could see the mold.

Q. Was there any controversy between you and Mr. Hinkle, and John on the other side, about the quality of the hops that were in those samples?

A. No, not a bit. There was no dispute over that.

Q. Now, what was said, if anything, about a further inspection of them?

A. Well, it was agreed there that we would come back later when they had more time. And John said he was in no hurry; any time would do with him.

Q. What was the reason, if there was one, that you didn't make a complete inspection at that time?

A. The hops were piled up and there was no room to get at them. It takes lots of room. You have to line every bale up so that you can get at them. That was the only reason why we didn't go through them. We were ready. The warehouse man was gone. John didn't seem to know where he was or whether he could get at him or not. He said he didn't feel like tumbling the bales around there.

Witness continued: Mr. Hinkle went back that evening or the next morning. Witness didn't go

(Testimony of James Hayes.)

with him, was too busy in Eugene; was with him when he went back to inspect the hops about the 30th or 31st of October. Went out there in the morning, forenoon, there was quite a little parley there before John went over with us to the warehouse. We put in about all that day. Inspected every bale of hops. All of them were moldy, all showed mold, every bale I remember we tried; noticed that very carefully. The color was poor, it was not up to what the contract called for.

Q. Explain what you mean by poor?

A. A dull, muddy color, not bright, not bright like a nice load of hay.

Q. Was the color even?

A. No, I think the yard had fallen down that year, and caused probably to be some dead berries, etc. The dead berries gave them probably a reddish brown, something like that.

Q. Did it give it that color?

A. Yes, it did. The quality of the hops was not discussed very much during the day. He didn't say very much about the quality. We just went through them and taken as a matter of course. He didn't dispute any of the grading at the time.

Q. What I want to get at is this, Jim, whether or not, as you would take the samples out, John was there and looked at them himself?

A. Yes.

Q. Was the fact that they were all moldy called

(Testimony of James Hayes.)

to John's attention at that time?

A. Yes, sir.

Q. What, if anything, did he say about it?

A. Well, he didn't dispute it any. He could not dispute it. The hops showed for themselves.

Q. What was said, if anything, between Mr. Hinkle and John on account of the advances?

A. Well, after he went through the hops he told him he demanded the money back.

Q. What did John say about it?

A. John said he would have to give him time, or wait till he sold his hops.

Q. Was anything said about arbitrating?

A. Yes; I think Mr. Hinkle said that he would like to arbitrate with him if he was not satisfied with his grading.

Q. State whether or not John said that he was satisfied or was not satisfied?

A. Well, John didn't either say he was satisfied or dissatisfied. He didn't say anything.

CROSS EXAMINATION

By Mr. Slater:

Q. Now, Mr. Hayes, when you were there the first time, on or about the 3rd of October, can you state just what the conversation was between Mr. Hinkle and Mr. Edmunson about these hops?

A. You mean about the quality or about going through them?

Q. Yes, all the conversation that was had there

(Testimony of James Hayes.)

at that time?

A. Well, Mr. Hinkle told him—he wanted to know if he had any better hops than those.

Q. Well, now, what did Mr. Edmunson say?

A. First he told him no. And afterwards he told him maybe he did have.

Q. Well, what did Mr. Hinkle say about the quality?

A. Well, he told him the quality was inferior; it was not up to the contract.

Q. Is that all he told him?

A. Well, I think that is the substance of it, yes.

Q. Didn't he say something about being willing to take these hops under that contract?

A. He said he could not take them unless they was better than that sample, than those two samples.

Q. Is that all he said?

A. I could not repeat word for word what he said; but that was the substance of it.

Q. You don't mean to say that Mr. Edmunson didn't say anything at all to Mr. Hinkle there?

A. He said first that he thought those were as good hops as he had. And afterwards he seemed 'o be kind of debating in his own mind and came to the conclusion that he thought he had better hops in the pile.

Q. Now, the fact is, you could have made an inspection at that time, if you and Mr. Hinkle had been willing to tumble those bales around, couldn't

(Testimony of James Hayes.)

you?

A. Well, I had an engagement myself that afternoon to take in a lot in Eugene. And I can't speak for Mr. Hinkle; he can speak for himself.

Q. The real fact is, you didn't want to spend the time there that day in handling those hops?

A. It is the warehouse man's business to tear a pile down and line it up for the buyer.

Q. Well, but the main reason, now, that you didn't inspect that day, was because you and Mr. Hinkle didn't want to handle those hops?

A. The reason we didn't inspect them was because they were not lined up.

Q. But they were there in the warehouse?

A. Yes, they was piled up and hay piled around them; that is, part of the warehouse was piled full of baled hay.

Q. You don't mean to say the hay was on the hops?

A. No, I don't mean to say that.

Q. Well, there was—

A. There was no room to line them up.

Q. No room?

A. No, sir.

Q. How much room do you need for the inspection of hops?

A. It takes a whole lot of room for 200 bales of hops.

Q. You want to have the bales all up in one row,

(Testimony of James Hayes.)

do you?

A. No, it is not necessary. You can line up 40 or 50 bales and pile them up again.

Q. You didn't like to do that kind of work?

A. That is not the buyer's job. That is the warehouse man's job, and he was not there.

Q. The reason, then, that you—

A. It is the grower's, the warehouse man's business to line up the hops, furnish scales, etc.

Q. The reason you didn't inspect that day was that you didn't want to do that work?

A. Well, it was late in the forenoon when we got there, and I had an appointment in the afternoon in Eugene to take in a lot of hops.

Q. Now, the last time you were there, on the 31st, who was there then?

A. Well, John and myself and Mr. Hinkle and the warehouse man.

Q. Did you have any more room there then than there was before?

A. I think there was.

Q. Wasn't it practically the same condition in the warehouse as it was when you were there on the third?

A. No, I think there was more room.

Q. Who did the work there then?

A. Well, the warehouse man and John, I think. lined them up, and we went through them.

Q. You didn't do any of the work?

(Testimony of James Hayes.)

A. No, sir. Oh, I helped.

Q. What?

A. I didn't do any boosting of any of the bales.

Q. You didn't do any of the longshoreman work?

A. No, but we were busy.

Q. Busy at what?

A. Trying the hops; carrying to the light, and sampling them.

Q. You could not do that until after this work had been done?

A. Not until after they was lined up.

Q. Now, did you hear all the conversation between Mr. Hinkle and Mr. Edmunson on the 31st of October, that occurred that day?

A. I could not say that I heard all of it.

Q. Well, were you with them all the time that they were there?

A. Oh, with the exception of probably a little while I was.

Q. Where were they when you were absent from them?

A. I think about the only time I was away I went to get the team, is the only time I remember I was away.

Q. How long were you away from them?

A. Oh, I don't know; probably 10 or 15 minutes, something like that.

Q. You don't know whether they had any con-

(Testimony of James Hayes.)

versation during that time or not, did you?

A. No, I could not tell what they was doing when I was not there.

Q. Do you know where they were at that particular time?

A. Well, I don't know whether they was in the warehouse or waiting for me on the road. I could not tell. The work was all finished.

Q. You say that you have been engaged in inspecting hops?

A. Yes, sir.

Q. That is part of your business?

A. Yes, sir.

Q. How long had you been so engaged before 1912?

A. Oh, 11 or 12 years, I guess.

Q. Were you working for Klaber, Netter & Wolf all that time?

A. No, sir.

Q. Now, you say these hops, according to the samples you examined, were poor in color. Now, what quality of hops were you comparing these with, to get your judgment of poor color?

A. Well, either primes or choice.

Q. How?

A. They were poor as compared with prime hops.

Q. What kind of a color would you require for a choice hop?

(Testimony of James Hayes.)

A. Well, a choice hop is a bright color; clear, bright color.

Q. Velvety color?

A. Yes, sir.

Q. Well, now, are there different grades of colors for choice hops?

A. Well, there might be a little—the main thing, the color has got to be bright and clear, whether it is a yellowish color or a greenish color; not dull, like it had been tramped in the ground.

Q. What is the difference in color between a choice hop and a medium hop?

A. Well, there would be about as much difference in color there as there would be between a five dollar gold piece and a penny, as near as I can tell you.

Q. What is the color of a prime hop?

A. It is a bright color.

Q. Is it a bright color, too?

A. Yes.

Q. About the same as a choice hop?

A. Not quite so bright.

Q. A little shade darker?

A. A little shade darker, yes.

Q. And what would be the color of a hop they call a medium hop?

A. Well, that would be duller, considerably duller than the prime.

Q. Just a shade duller than the prime hop, is

(Testimony of James Hayes.)

that it?

A. Yes.

Q. But still a medium hop would have to have a good color, wouldn't it?

A. Well, we don't consider a medium hop a very good color.

Q. Don't consider what?

A. We don't consider a medium hop as having a very good color.

Q. Then you don't agree with some other experts on that question?

A. If you call a dull color a good color, why, I don't.

Q. Well, now, how do you distinguish between a bright color and a dull color?

A. By my eyes, I guess, is all I know.

Q. Well, as to the characteristics?

A. Well, I just told you. A choice hop is like a real bright, glossy load of hay, while a medium would be more like a poor load; bad color; might have been out in the sun too long or damaged a little with rain, something like that. That is as near as I can get at it.

Q. In other words, a choice hop would have to have a glossy appearance like it had been varnished?

A. Yes, bright color; pretty.

Q. Now, while you were with Mr. Hinkle and Edmunson, in their presence, will you state what conversation they had about the quality of these

(Testimony of James Hayes.)

hops?

A. Well, I think I have already gone over that.

Q. I didn't hear it. You have given your conclusion, and not what was said.

A. Well, Mr. Hinkle told him they was a poor lot of hops; they didn't come up to the contract, and he couldn't take them.

Q. Is that all he said?

A. Oh, I don't know as that is all he said.

Q. I want all that he said.

A. I couldn't say all that he said—I could not repeat every word he said.

Q. Well, do you know anything else that he said?

A. Well, that is all I recall; the substance of the hops; they were poor; there was mold in them; some of them were slack; none of them up to first quality.

Q. Well, that is a question of what is first quality. Now, if you are not able to say what Mr. Hinkle said, can you tell me what Mr. Edmunson said?

A. I just told you what Mr. Hinkle said.

Q. I am asking you now what Mr. Edmunson said.

A. He didn't say much of anything. He didn't stand up and dispute the fact that they were first quality.

Q. That is a mere conclusion. I want to know what he said.

(Testimony of James Hayes.)

A. He didn't say much of anything.

Q. Can you say that he said anything at all?

A. Well, he didn't dispute the grading of the hops. I could say that much.

Q. But you can't say what he said, can you?

A. Further than the fact that he didn't disagree with Mr. Hinkle or hold up that his hops came up to the contract.

Q. But you can't say what he said?

A. I could not use the words, his words.

Q. Now, didn't Mr. Hinkle say to Mr. Edmunson, "I want these advances back?"

A. He demanded the money back after he got through, yes.

Q. What did Mr. Edmunson say in response to that?

A. He said he would have to give him time; wait until he sold the hops. He thought hops would get better, something of that sort.

Q. After he sold the hops. Did Mr. Hinkle say anything to him about selling the hops?

A. After John sold the hops?

Q. No; after Mr. Edmunson said that he could not pay back the advances until after he had sold the hops, did Mr. Hinkle say anything to Mr. Edmunson about him selling the hops?

A. Oh, I think he told him—no, I cannot say what Mr. Hinkle's reply was. I don't remember.

Q. The fact is, you don't remember what was

(Testimony of James Hayes.)

said there at that conversation, do you?

A. Well, I just told you what I remember of it, as much as I remember of it.

Q. But your memory is very poor about what was said there at that time?

A. I don't think it is.

Q. Well, if your memory was good, couldn't you tell me what Mr. Hinkle said?

A. I remember Mr. Hinkle asked for the advances back, and John told him that he could not pay him back till he sold the hops. I remember that he didn't go any further. That is, it seemed to be satisfactory with Mr. Hinkle to wait. He said he wouldn't crowd him, or something of that sort.

Q. Now, did you have any grade that you put on those hops at that time?

A. I don't understand what you mean by grade. I think they were sorted and each lot marked with a certain number.

Q. Well, how did you grade them at that time, as graded by hop inspectors, outside of this contract, I mean?

A. I didn't grade the hops. Mr. Hinkle graded them.

Q. Didn't you express any opinion about them?

A. Well, I had an opinion. I don't remember whether I expressed it or not.

Q. Well, what was your opinion at that time?

A. As to the quality of the hops?

(Testimony of James Hayes.)

Q. Yes.

A. My opinion was that they were poor hops.

Q. Did you ever express an opinion that they were mere trash?

A. I don't think I ever said they were trash.

Q. Didn't you testify at the trial of this case at Eugene, in the Circuit Court of the State of Oregon, there?

A. Yes, sir.

Q. Didn't you testify there that in your opinion they were mere trash, or to that effect?

A. My best recollection is that I testified that I had heard them called trash.

Q. How?

A. My best recollection is that I testified that I had heard them called trash. I think the lawyer tried to make me say they were trash, but I don't think I said it.

Q. Now, were you not asked this question at that time, testifying as a witness: "You find any good quality in the hops at all?" and didn't you answer: "No, sir, it was a poor lot of hops, very poor."

A. Yes, sir, that is right.

Q. "When they get very poor it is what they call trash?" and didn't you answer: "Yes, that is what the trade calls them."

A. I heard the trade call them trash. I never said they were trash.

Q. You didn't intend to be understood at that

(Testimony of James Hayes.)

time that you were grading these hops as trash?

A. No, sir, just what I had said. I had heard the lot called trash in a casual conversation—lot of trash, something of that sort. And I had—

Q. Now, what constitutes the material part of a hop for brewing purposes?

A. The lupuline, I suppose.

Q. Where do you find that?

A. That is in the inside of the hop.

Q. Is that the only name that it goes by?

A. I don't know anything about the chemical names of hops.

Q. You don't know anything about the chemical qualities of the lupuline, do you?

A. No, sir, I don't.

Q. Did you ever hear it called resin?

A. Yes, I think I have.

Q. Now, if the hop is a fully matured hop, you say it has plenty of lupuline, and that constitutes the beer-making quality of the hop?

A. I don't know anything about the beer-making quality.

Q. You don't?

A. All I know about it is the selling value of the hops.

Q. Selling value?

A. Yes.

Q. What constitutes the selling value?

A. Well, color and quality.

(Testimony of James Hayes.)

Q. They don't make beer out of the color, do they?

A. I don't know anything about making beer.

Q. You don't?

A. I don't think I was ever in a brewery.

Q. Well, in inspecting hops, why do you put so much stress on color?

A. Well, because we can sell them. They sell according to the color and appearance, etc.

Q. Is that the only quality you inspect for, is color—

A. Oh, the color, and get them clean picked, rich in lupuline. It shows by the cut.

Q. What do you mean by rich in lupuline?

A. It shows by the cut; right down the cut you can see whether there is lots of lupuline or whether it is thin. They want to be flaky, silky.

Q. I want to confine your examination to that lupuline. You say it has to be rich in lupuline. Now, as a matter of fact, isn't that the prime necessity in the hop?

A. Well, of course, if it didn't have any lupuline in, I suppose it would be worthless.

Q. It would not have any value at all, would it?

A. I suppose not.

Q. Although it had a good color, it would not have any value at all, would it?

A. I don't think it would be possible for a hop to have a good color, etc., unless it had lupuline in

(Testimony of James Hayes.)

it.

Q. Do you think the lupuline makes the color?

A. No, I don't.

Q. Well, then, if lupuline does not make the color, it would be possible for a hop that had no lupuline in it to have a good color, wouldn't it?

A. I don't think it would be possible for a hop to have no lupuline in it. It would not be a hop.

Q. It would not be a hop at all?

A. I don't think so.

Q. But if a hop is rich in lupuline or resin that constitutes the lupuline, then it would be a good hop, wouldn't it?

A. I don't exactly understand that question, what he means by a good hop.

Q. Well, you are supposed to be an expert on this line.

A. If you want to know whether it is a choice hop or a prime hop or a medium hop, I can tell you about the selling value of the hop.

Q. Well, this contract does not specify a choice hop.

A. Well, a first quality hop, for that matter.

Q. A hop of a certain quality. One of them is a mature hop. What constitutes a mature hop?

A. That is a ripe hop; not picked green; full size.

Q. A full sized burr?

A. Yes.

(Testimony of James Hayes.)

Q. Some burrs that are very large have no lupuline in them at all, don't they?

A. Never seen a hop that didn't have any lupuline in them.

Q. Don't you know, as a matter of fact, in your experience as a hop inspector, that hops grown on a moist piece of ground, down in a hollow, is a big burr, fluffy, and had no fat or lupuline in it?

A. That is not a fact at all. I know hops grown between two and three thousand pounds to an acre, grow strictly good, choice hops.

Q. Yes; but hops grown in that way are a compact, hard burr, showing that they are fully matured. Isn't that true?

A. I don't believe I just get the drift of your question.

Q. (Question read.)

A. Well, his other question was that he asked me if hops grown on rich land, asked me whether they had much lupuline in them or not.

Q. No; that is not the question at all. I asked you if you didn't know hops growing in a low, moist place, where there is an excess of moisture, are large, fluffy burrs, like a bunch of feathers, and have no lupuline in them or prime quality at all?

A. No; sometimes they grow in the lowest, richest place, and they are very good hops.

Q. I didn't say rich. I said in a moist, damp place.

(Testimony of James Hayes.)

A. Well, my answer would be the same.

Q. Would be just the same. You give that as your expert opinion?

A. Well, I think the tendency would be they would not be so rich, quite so rich, where the moisture was excessive or the growth was excessive, as they would be on higher soil where you didn't raise so many to the acre, although I have seen choice hops grown on what you might call the richest land and get close to 3,000 pounds to the acre; and that is about as much as hops ever make.

Q. I am not questioning that; but don't you know, as a matter of fact, that in yards that grow as much as 3,000 pounds to the acre, grow in low places where there is an excess of moisture, the foliage is excessively large and green and the hop burrs are large and fluffy and of no value at all?

A. Oh, I think there would be value to it.

Q. Well, any material value?

A. I never seen hops so lacking in lupuline that there would not be any value to them.

Q. I will ask you this question: As a matter of fact, don't you know that on an upland, in a dry season, the hop burrs or cones are small and very dense, and yet are good hops?

A. Yes, they might be good hops.

Q. So that the quality of the hop does not depend merely upon the size of the burr, does it?

A. No, sir.

(Testimony of James Hayes.)

Q. But it depends upon the solidity of the burr and as to whether there has been an excess of moisture or not.

A. It depends on whether it is mature.

Q. Sure. Now, a mature hop is one that has the lupuline fully developed in the center of the cone?

A. Yes, a good, ripe hop.

Q. A good, ripe hop. Now, if a chemical analysis was made of these same hops and shows that the resin or the beer-making quality of the hop is equal to the average best hop, would you still maintain that these hops were not a mature hop?

A. I don't know anything about chemical analysis. We can't sell them that way.

Q. Now, as to the degree of maturity of a hop—how much less maturity of the hop as to lupuline does it require to make a prime hop as distinguished from a choice hop?

A. Well, a hop would not be choice unless it would be fully matured. If it is picked green it would show in the color.

Q. Well, now, would a prime hop have to be fully matured?

A. Yes, it would.

Q. Well, what difference, then, or distinction is there between prime hop and a choice hop?

A. Well, I think I have answered that question several times. A prime hop don't need to be quite

(Testimony of James Hayes.)

so bright; the quality not quite so good as a choice hop. It take a pretty good hop to be a prime hop.

Q. A pretty good hop?

A. Yes, sir.

Q. Just a little difference in the painting that nature puts on the face of the hop—is that all?

A. Well, I would not say it is quite as good a hop as the choice hop.

Q. But you don't know just what quality makes that distinction?

A. It is pretty hard to describe that. If I had a sample, I could show the jury better than I could describe it.

Q. In fact, there is no certain rule to go by to distinguish a prime hop from a choice hop, is there?

A. Well, it takes quite a bit of experience to acquire that, and one has to be able to do that to buy them successfully.

Q. Well, it rests on the personal judgment of each man, doesn't it?

A. Well, the trade is quite unanimous in deciding what is a prime hop and what is a choice. There is practically no difference depending on the grades.

Q. Practically no difference. But there is some difference in opinion, isn't there?

A. Well, no material difference.

Q. Well, what difference is there, if any?

A. No difference.

Q. No difference at all?

(Testimony of James Hayes.)

A. Practically no distinction.

Q. The expert opinion, then, is uniform on distinguishing a prime hop from a choice hop?

A. Yes, sir.

Q. And the only distinction I am able to get out of you is a slight difference in the brightness of the color?

A. Well, I don't think I answered that question just that way. A prime hop don't need to be quite so good in any respect as a choice hop.

Q. Well, that is what I want to find out. I want to find out whether there is any difference as to the maturity of the hop. You said no.

A. Well, a prime hop would need to be mature.

Ross H. Wood, called as a witness on behalf of plaintiff, being duly sworn, testified in substance as follows:

I reside in Portland, Oregon; am in the hop buying and shipping business; have been for 12½ years; was buying and shipping hops in 1912 and 1913 for Harry L. Hart, of Portland, and was working for him at the time he bought the Edmunson hops. I bought the hops and received them. Arrived at the valuation of the hops on the samples that we had of the crop out of the different bales. I inspected all or practically all of them. Inspected them with a tryer in each individual bale. John Edmunson, Lawrence Edmunson and the warehouse man and myself lined them up. When in the warehouse, it is a

(Testimony of Ross H. Wood.)

rule that the warehouse man lines them up. They charge for handling them; lining them up. The hops were purchased on samples that I cut myself. When we first sampled the crop to buy them I took probably six or seven samples. There were practically three grades of the hops, as near as I can tell. There was right close to 80 bales in the best grade. Of the 80 bales, 78, 80, 81 or 82 bales. They made two carloads. We put in 103 bales in the carload with the 80 bales. We paid 14 cents for this carload. We bought the crop at different prices. We were loading them into two cars instead of making an 80 bale car and putting the balance in a larger car; we just split the lot and made two carloads, 103 in each car. We paid 10 cents for the second carload. At that time prime hops were worth around $15\frac{1}{2}$, 16, $16\frac{1}{2}$ cents I believe. First quality hops were worth, I imagine, around $16\frac{1}{2}$ and 17 cents, carload lot.

Q. Did you notice any defects in the hops of the Edmunson crop as you inspected them?

A. Well, we bought them—the price speaks for itself. We bought them at different prices, of course, but our best price was not a price for first quality—14 cents.

Q. What defects were in them?

A. They were not any too well matured, and there was mold more or less all through them, some of them, of course, worse than others; and some of them was not very well dried.

(Testimony of Ross H. Wood.)

Q. Could you say that they were properly dried?

A. No, I could not. There was some of them that was, yes; some of them were dried all right.

Q. You may state whether or not they were of even color.

A. No, they were not.

Q. Just describe to the jury how they were of uneven color.

A. Well, that is pretty hard to do. There were some of the hops that were really over-ripe and some of them were green, mixed in all the samples, of the trying of each bale. Some of them showed more mold than others. The moldier ones would be the riper hops. That is about all you could tell in regard to hops without having a sample.

CROSS EXAMINATION

By Mr. Slater:

Q. Mr. Wood, you say that there were only 80 bales of this lot of hops that you could grade as of a better quality than the others?

A. There were some 80 bales that were of a better quality than the balance of the hops, yes.

Q. That is all you could find, now, that you could put into that grade?

A. Well, we didn't exactly grade the hops, only for a better hundred of them, and then a couple more of the best left to fill out the car.

Q. Do you mean to say that there was any ma-

(Testimony of Ross H. Wood.)

terial difference between those 80 bales and the next 130 bales?

A. Yes.

Q. What was the material difference?

A. Well, they were a little evener in color and not so much mold in them.

Q. Now, you give that opinion now as an expert, do you?

A. Well, that is what the hops were, yes.

Q. Well, do you experts ever disagree about these things?

A. Oh, sometimes, in regard to picking, maybe one fellow would call hops a little poorer picked than others, in color yes, they can't exactly jibe.

Q. But you don't think you would disagree about the extent of mold in a hop, in a sample, and the injury it would make?

A. I hardly think so.

Q. You don't think different experts, now would disagree materially about how many bales of hops were of the best quality in this particular lot?

A. Well, that would be pretty hard to tell, in that lot of hops, because some of them in inspecting twice on the same bale would show a little difference in each side. They were mixed, sort of, don't you know.

Q. I see. Well, now, if some other expert that examined these hops, and said he had examined ev-

(Testimony of Ross H. Wood.)

ery bale, set aside 104 bales as containing first quality, you would not disagree with him, would you?

A. I certainly would.

Q. Now, if this evidence shows, that has been admitted here, that there were 104 bales of those hops that were marked as No. 1, in the inspection on the 31st day of October, 1912, would you say that you were correct, or that that expert was correct?

A. Well, he probably stabbed the bales in different lots. You know how hops are inspected, do you?

Q. Sure, I do.

A. Well, as I said, the lot was mixed. He might have got the good side of a few bales that I got the poor side of them, and different fillings in the baler.

Q. You know how hops are put in a kiln when they are dried, too, don't you?

A. Yes.

Q. They all go into the same kiln and are mixed?

A. Yes.

Q. So that when the baling is done at the kiln, they are generally of a uniform character?

A. Not always.

Q. What makes that difference?

A. One kiln can be dropped off the dry floor into the store room in one bunch, and another kiln next to it. And when they are filling the baler they might—they use big scoops—get a scoopful of one kiln and a scoopful of another. That would make a difference in the bale of hops.

(Testimony of Ross H. Wood.)

Q. Isn't it a fact that most of that difference occurs at the time of picking them; along at the last of the picking, the hops become a little riper and a little more of a yellow color; and of course being dried last they go in on top of the dry kiln? Now, isn't it possible?

A. It could be that way.

Q. Isn't it possible those hops might come out by themselves?

A. They might, yes.

Q. But that would not make a difference in the whole lot of hops, would it?

A. No; it would make a difference in some of the bales, though, at that.

Q. So you are not quite sure about the correctness of your opinion if some other witness here has testified there were 104 bales in this lot of hops that were marked as No. 1?

A. I would be if he used the same try holes that I did. Yes, sure, I would.

Q. Then it all depends upon the personal judgment of each man that examines them?

A. No, it does not. It depends on how the hops are baled.

Q. Now, you say some of those hops were **not** properly dried?

A. There were some 30 odd bales of them, I believe.

Q. You limit it now to 30 bales?

(Testimony of Ross H. Wood.)

A. I think there was.

Q. Not more than that?

A. There was more hops than that was not properly dried, that is, perfectly dry. But there were 30 bales that were worse than the rest.

Q. What was the trouble with those 30 bales?

A. They were slack dried.

Q. You took them in at what date?

A. At the same time.

Q. What was that date?

A. I can't tell you the exact date of that surely.

Q. It was along in March, 1913, wasn't it?

A. I can't tell you the date, I am sure. I could have looked it up, but I did not.

Q. Well, that was when they were sold?

A. Yes.

Q. Very well. Now, that was some six or seven months after they had been baled. And had any in-omnths after they had been baled. And had any injury come to those hops on account of being slack dried, as you say?

A. Poor flavor, yes.

Q. Poor flavor?

A. Yes, sir.

Q. Did you find that poor flavor just in those 30 bales?

A. No, sir.

Q. Where did you find the other poor flavor?

A. It was all through the lot. I can't tell you

(Testimony of Ross H. Wood.)

how many bales, but as I did tell you before, the 80 bales were the best flavor, best hops. The others were some of them a better flavor than others; some of them were poorer picked, worse than others, and some of them moldier than others.

Q. You say you bought these on sample; but what grade would you put them in according to the commercial custom?

A. I believe the 80 bales, better end of them was what we would call a medium to prime hop, good mediums at least.

Q. But you put 103 bales in that class, did you; and then you put 103 bales in another class?

A. Put them in another car, yes.

Q. Now, do you know how they were shipped?

A. They were shipped as a lot.

Q. As one lot?

A. Yes.

Q. To one person?

A. Yes; but on different samples, one sample. We represented the shipment as arriving 80 bales like one lot and the balance like the other samples.

Q. Do you know how they were sold as to sample?

A. How is that?

Q. Do you know how they were sold as to sample?

A. No, I don't.

Q. Did you make the sale?

(Testimony of Ross H. Wood.)

A. No, I did not.

Q. You didn't?

A. No.

Q. Now, you testified as a witness at the trial of this case at Eugene, didn't you?

A. Yes, sir.

Q. Didn't you testify there that these hops, the whole lot, were shipped as one shipment and went as medium to prime?

A. I don't know as I said whether they went as medium to prime. They did go as a lot.

Q. As a lot; that is what I mean.

A. Yes.

Q. But they went as medium to prime?

A. Well, I am sure that I didn't say they went as medium to prime, did I? Is that on there?

Q. Yes. You were asked this question: "What grade were the hops?" And didn't you answer: "Medium to prime is what we bought them for, and shipped them with the same grading."

A. We didn't ship the poorer end of those 30 odd bales.

Q. Didn't you testify to that as I have read to you at the trial of this case in Eugene?

A. I don't believe I hardly did that, no. We shipped them as a lot at two carloads. I know that. But as to shipping the poor end of those hops as medium to prime hops, it wasn't done.

Q. Do you know what particular quality of

(Testimony of Ross H. Wood.)

hops is required by this contract?

A. I have heard it talked about, yes.

Q. Did you ever see the contract?

A. No, I have not.

Q. Who undertook to relate to you the quality described in this contract?

A. I have heard it discussed by different people. I believe I discussed it with Mr. Edmunson there himself one time.

Q. So you understood at the time you bought these hops and inspected them as to what the requirements of this particular contract were?

A. No, I don't believe I did. It is since then Mr. Edmunson and I were talking about the lot and about the contract.

Q. Now, isn't it a fact that at the time you were taking these hops in, there was a conversation between you and Mr. Wood about what this contract required?

A. Myself and Mr. whom?

Q. Mr. Edmunson, I should say?

A. Edmunson. Well, I don't hardly remember whether there was or not. But it is understood—now, I don't know—I never saw this contract—but it is understood that hops delivered under a contract takes specified quality as primes or better; primes or choice, one or the other. I don't know what his contract calls for.

Q. Well, didn't you say to the defendant here,

(Testimony of Ross H. Wood.)

Mr. Edmunson, and his brother, in a conversation just after you had accepted and received these hops, that there were 20,000 pounds of these hops that ought to have been received on this contract?

A. I will tell you what I did say.

Q. Well, what was it?

A. That the 80 bales—it seemed like that Mr. Edmunson and Mr. Hinkle could have gotten together on the 80 bales. I didn't say according to the contract. I do remember that.

Q. You didn't say then—

A. That they should take them under the contract. I didn't, because I never read their contract; haven't seen it till this day. But I did say it seemed like the 80 bales better quality they could have gotten together on. Now, you ask Mr. Edmunson the question—

Q. That is all you said about that matter at that time?

A. I believe so, yes.

Q. Now, you testified, Mr. Wood, that some of these hops were over-ripe. Now, how did that affect the maturity of the hop?

A. Well, that was surely a mature hop. If it was not moldy, it was all right.

Q. How did it affect the quality of the hop, then?

A. You want the quality of the sample, or do you want just what the over-ripe hop is?

(Testimony of Ross H. Wood.)

Q. No, I want your judgment about the quality of this sample.

A. Well, there was some of them over-ripe and some of them not ripe enough—probably different parts of the yard.

Q. From what particular characteristics of the sample did you come to that judgment?

A. How is that? Well, because some of the hops were over-ripe by being red, and some of them were green. Just mixed in the sample.

Q. Well, don't you know, as a matter of fact, that in picking a reasonably large yard that the last of the picking usually is a little riper than the first?

A. Yes.

Q. They cannot all be of the same degree of color, can they?

A. Well, they can be practically so, yes; but not exactly the same. The first day's picking and the last day's picking—will be a difference in color; that is very true.

Q. What you men mean to get at is the general average of the crop?

Objected to as incompetent, irrelevant and immaterial.

COURT:—I think that is a pertinent question. I will overrule the objection.

MR. WILLIAMS:—Note an exception.

Q. (Question read.)

A. Well, yes. There was some of them green

(Testimony of Ross H. Wood.)

in each sample, and some of them were ripe—mixed—as you were talking a while ago about where those were dumped off the kiln floor.

Q. Well, you would expect to find in most any crop a few burrs that would be a little riper than others?

A. Yes; but not moldy.

Q. I am not talking about the mold. I am talking about the ripeness of them now.

A. Yes, but not over-ripe. These hops were over-ripe, were red.

Q. About the green hops. Do you say they were an immature hop?

A. Some of them were, yes.

Q. How do you arrive at that judgment—just because they were green?

A. Because they were of green color and thin. There was not very much lupuline in them—in other words, much pollen.

Q. Now, that pollen is in the center of the hop burr, isn't it?

A. Yes, sir.

Q. Now, that is the real beer-making quality of the hop, isn't it.

A. It is one of them, evidently.

Q. Now, couldn't a choice hop be greenish in color?

A. Not very well. It could be fully mature—

Q. Choice hops could not be of that quality un-

(Testimony of Ross H. Wood.)

less it was a fully matured hop?

A. It would have to be fully matured to be choice, yes.

Q. Your opinion is that a greenish hop could not be fully matured?

A. Yes, it can be fairly mature, but not ripe.

Q. Not ripe. So that, judging from the color, you would say that a choice hop could not be of a greenish color?

A. No, it could not be green, no.

Q. Well, then, in that respect your judgment differs from other experts that have testified here at this trial, doesn't it?

A. Probably it does, if they say so.

Q. Now, how do you judge as to the deficiency of lupuline in a hop?

A. By opening the burrs, as a rule; looking at the edge of a sample after pulling out a square-cut sample.

Q. From the color of it?

A. Well, a whole lot on the color. You can tell whether a hop is fat or not by looking at a sample pretty well from the color.

Q. Well, now, if it should appear that these hops that you say are of an immature character, upon a chemical analysis should have a quantity of resin or lupuline in the pollen up to the good average of a choice hop, then would you still say that your method of examination is accurate as against that

(Testimony of Ross H. Wood.)

method of testing?

A. Why, we buy and sell hops according to the quality that the brewers buy them at, is looking at the sample. And some brewers, of course, will take a greener hop than others. Some of them want ripener hops. But I believe if a hop is green and poor flavor that it cannot be anything but immature.

Q. You judge, then, because the hop, smelling, of it?

A. Yes.

Q. Has a poor flavor?

A. Yes.

Q. That it would be an immature hop?

A. Yes.

Q. Now, if you contract merely to buy a mature hop, without respect to color or anything else, would you undertake to say you can determine the maturity of that hop, the extent of it, with greater certainty than by a chemical analysis?

A. Not greater, I don't suppose, no. But that is not buying and selling hops. The way we handle our goods isn't that way.

Q. I am not talking about that.

A. I don't know anything about the chemical analysis of hops, I am sure.

RE-DIRECT EXAMINATION

Q. At the time you loaded the hops, put them in the car, and were settling with Mr. Edmunson for them, was there anything said between you and Mr.

(Testimony of Ross H. Wood.)

Edmunson in regard to the claim of Klaber, Wolf & Netter against Edmunson over advances?

A. I understood there was money due Klaber, Wolf & Netter. Mr. Edmunson told me at the time he was going to pay them.

Examination by Juror:

Q. Did you pay 14 cents a pound for 80 bales or 103?

A. I believe it was 103. I could not tell you.

Q. I mean for the whole carload.

A. I could not tell you right off-hand whether we paid 14 cents for more than 80 bales or not. I know there was three prices. There was one small lot—it was 8, 10 and 14. But I don't know just how many bales there were.

RE-CROSS EXAMINATION

Q. You say that you understood from your conversation that Mr. Edmunson was going to pay Klaber, Wolf & Netter?

A. He told methat he was going to, yes.

Q. Can you give his exact words?

A. No, I don't believe I can. I asked him about settling with Klaber, Wolf & Netter before the hops were shipped, because we didn't want to pay the wrong man—something to that effect. And he said that he was going to settle with Klaber, Wolf & Netter; and—now, I don't know just exactly the words; but that was the conversation.

Q. That is all he said at that time?

(Testimony of Ross H. Wood.)

A. I believe so.

Q. And you gave him a clear draft for the amount of the purchase price of these hops?

A. Either that day or the next, I am not sure.

Q. On whom was that draft drawn?

A. On H. L. Hart.

Q. The man for whom you had purchased them?

A. Yes, sir.

Q. Did you make the contract of purchase?

A. Yes, I bought them from Mr. Edmunson.

Q. Upon what did you agree to pay him?

A. How much a pound?

Q. Yes.

A. Let's see. I believe it was 14 and 10 cents.

Q. Was that the price agreed on at the time you agreed to buy them?

A. Well, I am not sure. I believe, according to the samples we bought those hops on, a price of 10 cents was on part of them.

Q. Yes. But you had these samples when you made the offer, didn't you?

A. I had the original samples I cut out, yes.

Q. When you made an offer, and you offered him 14 cents for the whole lot on that sample?

A. Yes.

Q. Then when you went and inspected the hops you cut him down to 10 cents on 103 bales and down to 8 cents on another lot?

A. On the poorer hops; we took them in at the

(Testimony of Ross H. Wood.)

price, yes.

RE-DIRECT EXAMINATION

Q. Why did you cut them down?

A. Well, the hops were not like the samples we had. They were poorer.

Excused.

Plaintiff rests.

John M. Edmunson, defendant, being called as a witness in his own behalf, being duly sworn, testified in substance as follows:

That he is defendant in the case, and the other defendant is his mother, and his mother had nothing to do with the running of the yard; had no interest in the contract; he had purchased the property and it belonged to him; she still held the title; he had been in the hop business since 1890; he had raised hops for a long time, and for the last ten or fifteen years had been mixed up with dealers one way or another, sampling and doing some inspecting; that he looked after the cultivation of these hops himself; did a great deal of the work in the yard alone.

Q. Now state about the care that you used in cultivating your yard, in what manner?

A. Well, I usually cultivate the yard according to the common custom they use in producing hops. I have carefully cultivated and sprayed and attended to them in every way in order to produce a good crop, get a good crop.

Q. And about picking?

(Testimony of John M. Edmunson.)

A. Well, I was unusually particular on the picking on account of the contract I had, because the market was lower than the contract price.

Q. Did you exercise personal supervision over your yard and the drying and picking of your hops?

A. Yes, sir.

Q. Now, testify as to the manner in which you dried your hops and the care you used.

A. Why, I dried them in the usual way, the usual manner that they use in drying hops to put up a good sample.

Q. How many hop houses did you have?

A. I had two houses, which contained three floors, one double house and one single house.

Q. And how many acres?

A. About 30 acres in hops.

Q. There has been some intimation here in the testimony that you might have overloaded your kilns in the process of drying. What is the fact about that?

A. I never do overload the kilns.

Q. How deep, generally, did you bank the hops in laying a floor for drying?

A. Oh, sometimes 20 inches; sometimes more, sometimes less. That would depend on the day's picking to a certain extent.

Q. And also it would depend somewhat on the nature of the weather, wouldn't it?

A. Yes, on the nature of the weather, and also

(Testimony of John M. Edmunson.)

on the time that you would take to dry them. To dry a big floor you would take more time; to dry a small floor doesn't take so much time.

Q. Did you use the same houses that you had always used?

A. Yes, sir.

Q. Did you ever have any trouble before about smoking the hops while drying them, or stewing them?

A. No, I never had any trouble whatever with smoke or anything like that in all my experience in drying hops in those houses.

Q. Now, what is the fact as to whether you dried these hops in question in the same manner that you had always dried your hops?

A. Well, I use the same process; run about the same heat ordinarily.

Q. Now, what is the fact about your hops falling down in the yard during the picking season? Did they fall down to any extent?

A. Not to any extent. There were some yards broke down some; some wires broke. But it didn't let the yard down on the ground. That is, it didn't let the hops down on the ground. It didn't go low enough.

Q. What is the fact about hop raisers, during hop picking time, usually having more or less difficulty of that kind always?

A. Well, during wet seasons they are liable to

(Testimony of John M. Edmunson.)

break any time. The wire is liable to snap and the hops come down on account of the heavy rains, heavy weight coming on the vines.

Q. Now, how is your hop yard wired?

A. Well, there is about 23 or 24 acres of it, something like that, is on a wire trellis, and about six or seven acres is on the old fashioned pole system—a pole to every hill.

Q. Now, there is some testimony here that Mr. Hinkle and Mr. Hayes went up to Goshen same time about the first of October to examine the hops raised by you, in 1912. You may state now what took place there at that time.

A. Well, they came up there on about that date, and I met them by appointment at Goshen for the purpose of inspecting the hops under the contract. And we went over to the warehouse, got the keys, I think, from the depot man or the warehouse man; opened it up, and went in. Mr. Hinkle pulled down a couple of bales and took two samples, one from each bale; looked at them; took up a little time and told me that they could not take the hops on those samples on the contract; could not take the hops. And I told him I supposed that he was there to inspect the hops, and asked him if he intended to reject the hops on the two samples. And he said that was all he could do. We had some more conversation about the inspection. I wanted him to inspect them at that time, and he refused to inspect them—said they had

(Testimony of John M. Edmunson.)

a lot of work or something. I told him that I would like to have it done because I was in a hurry to get the thing off my hands. I had kept them now for quite a while. The market was going down and I wanted to get rid of the rest of the hops. I had more than the contract called for; and they had the privilege of selecting from the whole bunch, from all the bales. I could not sell the extra hops left over without they had selected—they had to make their selection first, as I understood the contract.

Q. Now, was there anything said there about selling the hops?

A. He told me that he could not take the hops, and I asked him what he could do. I expected maybe that he had in view they might handle the hops in some way. And he said no, they could not handle the hops at all. He advised me then to sell the hops to someone else. And after that we had a private conversation together, and he demanded the money back on the—he demanded the advance money back.

Q. That was on the 3rd of October, was it?

A. It was on the 3rd of October.

Q. Now, was there anybody present with you and Mr. Hinkle when he demanded that money back?

A. There was not.

Q. Where were you?

A. We were out on the porch together, by ourselves—the porch of the warehouse.

Q. Now, what did you tell him when he said to

(Testimony of John M. Edmunson.)

you that you could sell the hops to some other parties and demanded the money back?

A. I told him that I could not pay the money back.

Q. Well, what was said, if anything, by you as to the quality of the hops?

A. I told him I thought I had hops good enough to fill the contract, a sufficient number of them.

Q. Then what did he say about that?

A. Well, he didn't say anything that I remember. He said he didn't do the grading. They did the grading down there at the office at that time. He also said if the hops ran prime, why, he would take them on the contract.

Q. What was your last remark?

A. He also said if the hops were prime he would take them on the contract at that time.

Q. And then what did you do?

A. Well, that was about all there was done or said at that time. He and Mr. Hayes returned down to Eugene, I think.

Q. Well, were you sick that day, or complaining?

A. No.

Q. Please speak out.

A. No, I was not sick.

Q. Did you have any conversation after that and during the same day with Mr. Hinkle?

A. Yes. When I got back home, it was about

(Testimony of John M. Edmunson.)

noon, I think. He called me up from somewhere below, perhaps Eugene, said he would be back up that afternoon to inspect the hops. And meantime my baby got sick; I had to go after medicine down to a town called Springfield; and while I was on the road after medicine I met Mr. Hinkle. He came up on the train, I believe. I told him to go ahead and inspect them, that I had to go to Springfield and would be back as quick as I could get there. He said he would not do it himself. He caught the next train back for Eugene. That was just between trains he was there.

Q. Now, there is some testimony here to the effect that you told him that you were not in a hurry about having the hops inspected, or words to that effect. Was there anything said by you in that respect?

A. No, I never told him that I was not in a hurry. It was just the reverse. I was in a hurry to get the hops off my hands.

Q. Now, the second time that they were up there, state what occurred then?

A. Well, the second time they came up they came up in a buggy and came down home, called me out, and Mr. Hinkle told me that they had come up to inspect the hops. And I told Mr. Hinkle that I didn't think I would let him inspect the hops because he had regularly rejected them before, and we argued around there for an hour, I suppose; talked about

(Testimony of John M. Edmunson.)

one thing and another, and finally—I hadn't inspected them myself as yet, I didn't know what I had exactly—I told him we might as well go up and inspect them anyway, that we could inspect them in a little while I supposed. And he stated before I made that arrangement that he would take whatever prime hops I had on the contract.

Q. Now, do you know what day of the month that was?

A. That was on the 31st of October, the last day of October.

Q. Now, who else was there with you and Mr. Hinkle at the time of this last inspection?

A. There was not anybody there. Mr. Hinkle and Mr. Hayes and myself inspected the hops.

Q. Was your brother there at all during that day?

A. Well, I don't remember whether he was there that day or not. I don't think he was. He might have been there during the last end. I don't believe he was there that day, though.

Q. What did you do there that day about inspecting the hops?

A. Well, we inspected the hops in the usual manner by taking so many samples, by prodding each and every bale.

Q. Who made the inspection?

A. Mr. Hinkle made the chief inspection.

Q. Did your brother assist in handling the bales

(Testimony of John M. Edmunson.)

at all?

A. No; I don't think my brother was there that day.

Q. Do you know what is the custom in respect to handling bales during the inspection?

A. Well, the warehouse men usually handle the hops—take them down and are supposed to put them up, in the ordinary hop business.

Q. After they had inspected the hops the last time, will you state just what Mr. Hinkle told you about the hops?

A. After he inspected them?

Q. Yes, or during the time he was inspecting them.

A. Well, during the time he was inspecting, why, once in a while we would have a little conversation. I would tell him that he was grading them pretty hard, there was lots of good hops in there; and he would grade them just the same and make no difference. As a matter of fact, when it came down to the point, I asked him why he graded them one way and why he graded them another, and I would ask him also what he called the hops. He said he didn't know what they called them at the office, that they graded them down there. When we went up there he didn't have any samples to match them with. In the grading that they took from the office; didn't grade them on the matched samples that they had received before I sent samples to him about the 15th

(Testimony of John M. Edmunson.)

of September, I think, immediately after I got the hops baled, all those baled that were picked. When I was through picking I was practically through baling and was ready to sell or deliver or do anything I wished. I didn't have a big cooler to keep them in; so that I sent samples of my own—cut them myself.

Q. Now, did you have any conversation with Mr. Hinkle that same day after he had finished the examination of the hops?

A. Yes.

Q. Where was that conversation?

A. That conversation was over in a horse shed.

Q. How did you come to go over there?

A. Well, Mr. Hinkle didn't want anybody to listen to the conversation that we might have between ourselves. We went over there about 50 yards in the mud. We had a little conversation.

Q. Well, now, state what occurred there?

A. Well, he said that he could not take the hops, that they didn't show the quality that he figured they required down below, which meant his office; and that he could not take the hops under the contract, and he demanded his money again.

Q. Well, what did you say to Mr. Hinkle?

A. I told him that I could not pay him the money; that I thought they ought to take most of the hops on the contract, or all the hops; that he hadn't taken a good line of samples to show the office, and I didn't like his inspection.

(Testimony of John M. Edmunson.)

Q. Well, what, if anything, did you say to Mr. Hinkle about handling the hops at that time?

A. How do you mean, marketing?

Q. Under this special provision of the contract that has been called in question.

A. Well, I didn't say anything only that he refused—the conversation was that he refused. He told me that he could not take the hops under the contract; that he would have to reject them; and he could not handle them under any consideration. That was the conversation with reference to taking them under the contract. He said he could not take them under the contract or any other way.

COURT:—Did you and he disagree as to the quality of the hops?

A. At the time of the inspection?

COURT:—Yes.

Q. Now, as I understand you, he told you that he would not take the hops under any conditions whatsoever?

A. That is the conversation.

Q. Can you give the exact words he said in answer to that?

A. He said that he could not take the hops under any consideration, either under the contract or under any other way.

Q. Now, you testify that he demanded back the money. What, if anything, did you say about paying back the money?

(Testimony of John M. Edmunson.)

A. I told him that I could not pay him back the money; that I didn't know what I would do about the money at that time.

Q. Now, were you familiar with the market price of hops during the year 1912?

A. I knew quite a little about the market.

Q. What was the market price of hops during October, 1912?

A. Well, the market price ran all the way from 20 cents down to 15 cents and 14 cents. Some hops were bought in that section for less than that.

Q. Well, what do you mean by running down?

A. The market had a downward tendency. During the middle of October it went down, and then during the last of October it came back a cent or two; and then it went down again immediately after, in November.

Q. What was the market price of choice hops along about the 31st of October?

A. Well, they were worth about 15 or 16 cents up in that section, it seems to me.

Q. What was the market price of prime hops?

A. Well, they would run along about 14 cents—
15.

Q. Now, after Mr. Hinkle had rejected these hops, what did you do about selling them?

A. I didn't hear the question.

Q. (Question read.)

A. Well, immediately after he rejected them the

(Testimony of John M. Edmunson.)

market dropped and commenced to fall. And during the month of November the market dropped down to ten cents and ten and a half and eleven in that section; lots of hops bought in that section at 10½ cents. So that I let the proposition slide, as a matter of fact, and kept the hops; figured that the market would perhaps come back. And it finally did come back. I kept the hops until about the 10th or 12th of March, when I sold them.

Q. Whom did you sell them to?

A. I sold them to Hart, Hart and Company.

Q. Was that just an oral contract you had then?

A. Yes, it was the ordinary sale contract they make between buyers and sellers.

Q. What were you to get for them?

A. I was supposed to get 14 cents for the entire crop straight through.

Q. And were they sold on sample?

A. Yes, they were sold on sample. They had samples out of the crop.

Q. How many samples did they have?

A. Oh, they had perhaps seven or eight samples. They had quite a line of samples out of the crop, more than anyone else.

Q. Now, how long after you made this contract of sale was it until the hops were inspected and taken in by Mr. Hart?

A. Well, I think it was three or four days.

Q. What was the condition of the market dur-

(Testimony of John M. Edmunson.)

ing that time?

A. It fell, from the offers that I received from dealers, it fell at least two cents.

Q. Now, when they came to inspect, state what occurred there at that time.

A. Well, when they came to inspect, they looked through the hops, quite a lot of them, and said that they could not take them at that price.

Q. Did they give any reason for it?

A. Well, they didn't give any particular reason for it, no. They said the quality would not come up to what they figured on, I suppose. The market had dropped meantime a couple of cents. They made no objection to the hops.

Q. Now, what was the market value of hops at the time you made this sale—that is, of choice hops, if there was any market?

A. At the time I made this sale, between 14 and 15 cents.

Q. And what was the market price at the time you delivered them?

A. Well, it was down in that section to along about 12 cents.

Q. Now, when they inspected them and prepared them for shipment, what did they do about taking out samples?

A. Well, they took out—they usually take out about so many samples, about one sample out of every tenth bale. They took it when they inspected:

(Testimony of John M. Edmunson.)

they took out a line of samples; that means about one out of every tenth bale. That would mean something like twenty samples they took out at the first inspection. Then when they came back to ship, a few days afterwards, they took out another line of samples.

Q. What did they call these?

A. They call those the shipping samples.

Q. And where did they place them, now, immediately after they had drawn the sample out of the bale?

A. They had those samples lined up on top of a row of bales that were standing on end, outside of the house. They were standing out on the porch under the light.

Q. Those samples represented the whole crop, did they?

A. Yes, those samples represented the whole crop.

Q. Were those samples separated, as representing different qualities?

A. They were not.

Q. They were all in one line?

A. All in one line, set along in a row.

Q. Now, did you get any of those samples?

A. Yes, I took one of those samples. I picked out what I thought was an average sample out of that bunch of shipping samples and kept it.

Q. Did you ask them for that sample?

(Testimony of John M. Edmunson.)

A. I did.

Q. And you asked them to select one for you?

A. I did at first, asked them to pick me out a good average sample, and they refused to do it. They didn't want to do it, so I picked out one myself, and asked their judgment on it, and they said they thought it was a good average sample of the lot.

Q. Now, what did you do with that sample?

A. Well, I preserved that sample, kept it and used that as part of the evidence in the case that I had.

Q. I mean what did you do with it with reference to finding out the quality of the hops it represented?

A. Why, I had it analyzed.

Q. Where?

A. At Corvallis.

Q. By whom?

A. By Professor Pilkington.

Q. I understand you to say you delivered this sample to him?

A. I sent it to Mr. Pilkington later in the season, about the first of June, to have it analyzed.

Q. Now, there is some testimony offered here by the plaintiff that at the time you sold these hops and received a draft for it, that you said you would make arrangements with plaintiffs about their demand, or settle with them. What is the fact about that?

(Testimony of John M. Edmunson.)

A. I don't remember just what was said about that. I told him, I think, that if there was any settlement to be made at all with Klaber, Wolf & Netter, that I would do it. I think that was the language I used.

Q. Now, did you examine the samples that were taken from your hops at all of these inspections?

A. Yes, I examined most of the samples.

Q. Now, from your inspection of those hops, what would you say as to their quality?

A. I call them a good hop.

Q. What is your opinion as to what quality they were?

A. Well, I considered that I had over 20,000 pounds of choice hops in the lot.

COURT:—Over how many?

A. Twenty thousand pounds. And the rest of the hops would grade prime, with the exception of what they call the rip end. That was the seven or eight bales that they called over-ripe, and the ends of the leaves were turned red.

COURT:—That is the last picking?

A. That was the last picking, your Honor. What they would grade those, I could not say exactly.

Q. Now, there is some testimony here about two of the bales having perished. Have you any explanation for that?

A. There was two bales that we discovered—when Mr. Hinkle and I inspected them—that were

(Testimony of John M. Edmunson.)

hot, from the trying that he took out. And I moved those two bales out, and afterwards I hauled them down home along with some of the other slack hops that he had marked amongst the 30 bales, I think, were marked as slack. And I hauled back 16 bales to the dry house and thought I would re-dry and see how slack they were. So I took the two perished bales along, I believe, as he called them. And when I opened them up I found that the two perished bales were not slack hops at all, but that the roof had leaked on the dry hops where they had been dumped into the cooling room. And when the water struck the hops they all wadded up; and when the boys ran them into the baler they all kept together, stuck together and ran into a wad, were very wet. And I took that part of the bale out and re-baled the rest of the bale—both. There was about half the bales that were destroyed from that water, and the rest of the bale was nice and dry.

Q. You mean half of the two bales, or half of the 16 bales?

A. The rest of the two bales that perished, that were wet from the cooling. And my experience with the other slack bales, supposed slack bales—I hauled them back inside of two weeks after the inspection, and when I cut the twine and opened the bales up and took the burlap off, the hops were nice and dry, and they didn't need any drying. And I rebaled them and brought them back up to the warehouse

(Testimony of John M. Edmunson.)

and didn't haul back any more slack hops. When Mr. Wood inspeted the hops he didn't find any slack hops.

Q. Now, what is your experience with hop inspectors as to their being uniform in their judgment as to the quality of hops?

Objected to as incompetent, irrelevant and immaterial.

COURT:—I think that is an inquiry about the quality in effect of the hops. You may answer.

Mr. Williams:—I desire an exception.

COURT:—Very well, you may have your exception.

A. I find that they vary considerably. One will call a hop prime, and the other medium, etc. They will vary as much as one grade. And some vary two grades.

Q. Well, now, what would be the difference between a hop known as trash and a medium?

A. A prime and a medium?

Q. No; trash.

A. Well, trash, in ordinary hop language, means a hop that has no value at all. They use them sometimes—what they call packers—pack hops in to ship.

Q. Well, now, what would you understand would constitute a medium hop?

A. Well, a medium hop is a hop that does not have very much substance in it. It has a weak, poor, weak flavor, and a poor, weak hop; judge by its fla-

(Testimony of John M. Edmunson.)

vor more than anything else. That is the lupuline that is in it. If it has not much lupuline in it, it is a poor, weak hop.

Q. Now, what do you say as to whether, at the time that Mr. Hinkle inspected these hops on the 31st of October, that you had 30,000 pounds of hops there of the quality described in that contract?

Exception.

Mr. Williams:—Objected to as incompetent, irrelevant and immaterial, and as calling for a conclusion of the witness on this matter.

COURT:—He says he inspected the hops. He can give his judgment as to that amount.

MR. WILLIAMS:—I desire an exception, your Honor.

COURT:—Very well.

A. I considered that I had more than enough hops of the quality that would be sufficient, that would go on the contract. There was perhaps 50 bales or 60, between 50 and 60 bales, hops extra, besides enough. I had over 40,000 pounds, according to my recollection, in the whole crop.

Q. Now, who was it inspected these hops when you sold them?

A. Mr. Wood.

Q. The gentleman who testified here today?

A. Yes, Mr. Wood and Mr. Irwin.

Q. Now, what, if anything, did Mr. Wood tell you about there being 20,000 pounds of hops of the

(Testimony of John M. Edmunson.)

quality described in this contract?

A. Mr. Wood stated to me after the inspection was over that there was 20,000 pounds that should have gone on that contract.

Q. Who was present there at that time?

A. My brother and Mr. Heyer.

Recess until 2:00 P. M.

Portland, Oregon, February 25, 1916, 2:00 P. M.
John M. Edmunson. Resumes the stand.

DIRECT EXAMINATION CONTINUED

Q. Mr. Edmunson, at the time you were negotiating the sale of your hops with Mr. Hart, did you have any conversation with him over the 'phone about the quality of these hops?

A. Yes.

Q. You may state what that was.

A. One day while I was in Springfield I met Mr. Heyer and Mr. Wood, and they made me an offer on the hops; and I figured with them a while and didn't think that I would take it. So Mr. Wood wanted me to talk with Harry, that is Mr. Hart, his partner, over the 'phone. We were in the 'phone office at that time, and he called him up, talked with him and then asked me to talk. So I had a short conversation with Mr. Hart, in reference to the price, etc. And when we got through conversing on that line, I asked him how he graded the hops; and he says he graded them prime.

(Testimony of John M. Edmunson.)

COURT:—That was Mr. Hart's brother?

A. That was with Mr. Hart, of the firm; Harry Hart, that I sold the hops to.

COURT:—Mr. Hart, himself?

A. Yes, sir.

Q. Now, you may state to the jury to what, if any, extent any of these hops were affected by mold.

A. Well, there was about 20,000 pounds of them that didn't have any mold, you might say. I call them free of mold. And the rest of them they ran along gradually until the end of the season, and they had some little mold in them; until the final end, the last day or two of picking, they had considerable mold in them and were over-ripe.

Q. How long were you engaged in picking?

A. About 12 days, I think, that year.

Q. Now, was that a reasonable or an unusual length of time for picking hops?

A. No, that is about the average time for picking of that yard, and about an average season for the country generally; for 12 days to 15 days for most of the years in that section.

CROSS EXAMINATION

On cross examination, Mr. Edmunson testified, in substance:

There was some lice on the hops; that he sprayed the hops along the latter part of July, don't remember the exact date; usually sprayed along the latter part of July, sometimes into August a day or two.

(Testimony of John M. Edmunson.)

I think it was the same time that year. I sprayed them once with whaleoil soap which had naphthalene in it. Don't know how long it took to spray them; usually sprayed five or six acres a day; it would take about a week. Took about as long that year as it would any year. Could not say exactly as to the time, it was either the last of July or into August. When the lice come we usually spray most any time.

It was an awful wet and bad season all summer, and being asked whether lice are worse that kind of a year, than others, said, No, I don't think so, not any worse than some dry seasons. The lice were not very bad that year.

Q. Well, how did it come that there was more mold in the latter part of the picking than there was in the first?

A. Well, the lice—if you will remember that season—I was intending to start about the first of September, and I didn't get to pick many hops for a week. It rained for about three days steady at one time, and kept raining for a week before we could pick many hops. And in the week's time when the hop is about ripe or when it is ripe the mold comes awful fast; and it doesn't come until they do get to a certain stage of maturity.

Q. Then there were lice all over the yard at the time you commenced picking?

A. Well, there was some lice perhaps, on some of the yards, but they didn't show much till the last

(Testimony of John M. Edmunson.)

end of the picking.

Q. They were there, though, from the start?

A. I don't know whether they were or not.

Continuing, in substance the witness said: I never noticed the lice until the mold came on in the latter end. When I found mold, then I found lice. Where you don't find mold, you don't find many lice. The lice will come on in three days and make mold.

Q. When did you inspect those 20,000 pounds you say were practically free from mold?

A. I inspected them with Mr. Hinkle once, and then with Mr. Wood once. I inspected twice, or helped inspect—saw practically every or nearly every bale.

Q. Did you examine the hops while Mr. Hinkle was inspecting them, yourself?

A. Yes, sir; most all of them. I didn't examine every bale. I was carrying tryings out, and Mr. Hayes was carrying tryings out; and I was watching Mr. Hinkle most of the time.

Q. How did you make your calculation that there were about 20,000 pounds that were choice hops?

A. Well, Mr. Wood picked out about 20,000 pounds that he claimed was the best of the hops. I never picked out the exact amount myself, because I was not grading them, but it ran fully that much or more; how much more they would run I don't know.

(Testimony of John M. Edmunson.)

Q. Was that the reason or the fact upon which you base your judgment that there were about 20,000 pounds of choice hops?

A. Which?

Q. Was it on account of Mr. Wood's examination of them?

A. No, I examined them myself, most all of them.

Q. Well, that is what I am trying to get at. When did you examine them yourself?

A. I examined them along with him.

Q. With Mr. Wood?

A. Yes, I was right there all the time.

Q. Yes. Did you keep track of the number of bales?

A. Yes.

Q. That those grades were in?

A. Every bale was marked the way it was graded.

Q. How were they marked?

A. Well, I think—I have forgotten now exactly what mark was put on them. I could not swear to the exact mark.

Q. Do you want the jury to understand that the 20,000 bales of better hops there—20,000 pounds, were free from mold?

A. Yes, sir.

Q. That is your judgment. Now what was your judgment based on?

(Testimony of John M. Edmunson.)

A. My judgment was based on my inspection. I inspected them twice.

Q. Personal inspection?

A. Yes, sir.

Q. You didn't see any mold in them?

A. No, sir.

Q. Do you want the jury to understand those 20,000 pounds were even in color?

A. Yes, sir.

Q. Upon what do you base your judgment on that?

A. Well, I saw them with my own eyes.

Q. How were they about being mature, that 20,000 pounds you say were choice hops?

A. They were fully matured.

Q. And upon what do you base your judgment on that?

A. For the simple reason that they had attained their full growth, and if they had been left on the vines for a week or ten days longer they would have been like the latter end of the crop, what they call over-ripe.

Q. Now, were there any over-ripe hops in that 20,000 pounds?

A. No, sir.

Q. On what do you base your judgment on that?

A. I could not find any over-ripe hops, and besides, they were the first picking.

Q. How do you know those were the first pick-

(Testimony of John M. Edmunson.)

ing.

A. Because I picked them first.

Q. Did you mark the bales that you picked first?

A. I baled them up, yes, sir.

Q. How did you mark the bales?

A. I didn't mark them at all; I baled them out as they dried. They could not help being the first picking.

Q. How do you know that, if you didn't mark them in any way?

A. I know it by the color and the fact that they didn't have any mold in them.

Q. Now, upon what do you base your opinion that the hops were properly dried and cured?

A. Well, I have dried for twenty-odd years, I guess. I have had lots of experience along that line; and I dried—always had good success. My hops pass through on inspection always.

Q. Is that upon what you base your opinion that these were properly dried and cured?

A. Well, I dried them myself and examined them afterwards, and they were in good condition.

Q. You base that upon your examination of these particular hops?

A. Yes, sir.

Q. That they were properly dried and cured?

A. Yes, sir.

Q. And these 20,000 pounds were not affected by spraying or vermin damage?

(Testimony of John M. Edmunson.)

A. No, sir.

Q. Now, how about the second lot, John?

A. Well, the second lot had a small amount of mold in them. That was all the difference. They were really a ripper and better hop.

Q. There was some mold in the second carload?

A. Yes.

Q. Sufficient to make them take a lower grade?

A. No, I don't know. It is the way I graded them, anyway. They were a good prime hop, and a prime hop is not supposed to be perfect.

Q. Were they of even color?

A. Yes, they were all of one color.

Q. What color were they?

A. Well, they were a greenish color, green hop. It was a wet season, and everybody most raised a green hop that year.

Q. Now, were the second lot fully matured?

A. Yes, sir.

Q. Were any of them over-ripe?

A. No, sir; not only the last few bales.

Q. Were they cleanly picked?

A. Yes, sir.

Q. Were they properly dried and cured?

A. Yes, sir.

Q. But they were affected by mold?

A. They had some mold in them, a little bit; not very much.

Q. Well, can you give the jury any idea of what

(Testimony of John M. Edmunson.)

you mean by very little; not very much?

A. Well, it is mold that you would scarcely notice. There were enough hops left after the 20,000 with very little mold in it to fill the contract. Of course, there was a leeway there of 50 or 60 bales that had some more mold, some of them did, where it got along toward the end.

Q. If they had taken enough, aside from the 20,000 pounds to fill out the contract, they would have had to take hops in which there was some mold?

A. There might have been some mold in it, yes.

Q. Or vermin damage?

A. No, they were not damaged.

Q. Well, mold is vermin damage, isn't it?

A. Well, it don't damage anything until a certain stage in the hop business.

Q. When does that stage come about?

A. That stage comes about when they get over-ripe and the flavor leaves the hop.

Q. What effect does the lice have on the hop?

A. It doesn't have any effect on the hop.

Q. What do you spray them for lice for, then?

A. To keep them from having, keep them off the hop, so that if the wet weather come they might affect the hop. I have hops this year that is not affected by lice, no mold—

Q. I am asking you how lice affect the hop.

A. That is problematical. There is a question whether they affect them at all.

(Testimony of John M. Edmunson.)

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(Testimony of John M. Edmunson.)

Q. Oh, it is?

A. The atmosphere might affect the hop.

Q. The lice is what you call vermin, isn't it, in this contract?

A. It is commonly accepted as a vermin proposition, yes.

Q. If the lice gets in there and eats into the hop, it does some damage to it, doesn't it?

A. Well, I don't know. That is questionable.

Q. What?

A. That is questionable whether they damage or not.

Q. You mean by that, it is a question in your mind, or a question in the minds of hop men generally?

A. Well, I don't know. It is a question in my mind. I don't know what the minds of other people are.

Q. Well, there is a general opinion among hop men about the effect of lice upon the hops, isn't there, John?

A. Well, you have heard all kinds of opinions about that.

Q. Well, isn't there a general opinion that the lice do damage the hop?

Q. Well, at a certain time, when they mildew, or mold comes on so strong that they would spoil the hop, why then they are supposed to do the damage.

Q. What is it that brings on the mildew or mold?

(Testimony of John M. Edmunson.)

A. Well, I don't know. It is some kind of a fungus growth.

Q. You are not an expert, then, on the question of the effect of lice in hops?

A. Well, I could not say exactly whether I am an expert or know enough about it to know just what the effect is chemically or physically or any other way. I have seen things mildew where there was not any lice. I have seen things rot and spoil without the presence of any lice.

Q. Did you ever see mold in a hop where there were not lice on the yard?

A. Well, I have found mold in hops that I could not find any lice in.

Q. Well, the lice had died by that time, hadn't they, disappeared?

A. How?

Q. It was after the lice had died and disappeared, wasn't it?

A. I don't know anything about that, whether there was lice there and disappeared or not. I could not tell whether it was fungus growth or whether it was caused by lice.

Q. Did you base your judgment on these 20,000 pounds being choice hops, upon Mr. Bolam's testimony generally?

A. Oh, no. I didn't take much stock in Mr. Bolam's testimony.

Q. You don't take much stock in the testimony

(Testimony of John M. Edmunson.)

of any of these gentlemen, do you?

A. Well, they don't agree right together. I have got as good a right to my opinion as they have to theirs.

Q. I see. Now, you testified a while ago that you had 30,000 pounds of hops that would come within the definition of first quality hops in the contract. How did you arrive at that conclusion?

A. Well, I arrived at the conclusion that the hops were sufficiently merchantable to come under the terms prescribed under that contract, for the simple reason that when I wrote that contract Mr. Zeller and myself agreed on first quality as meaning prime, when I signed the contract; I was satisfied that the hops came within that provision. As far as a first quality hop is concerned, I don't know what it is. It is not in the hop trade. They don't use it.

Q. You read the contract all over before you signed it?

A. No, I read some of it over.

Q. Didn't you read it all over, John?

A. No, I don't think I did.

Q. Why didn't you read it all over?

A. Well, I think that I had read most of it some time or other. I have had a contract or two like that before, whether I read this one over. I know we read the terms of the qualification of the hop over. We had a discussion upon that, and agreed upon what a first quality would mean. Mr. Hinkle, when he came up,

(Testimony of John M. Edmunson.)

agreed to take prime hops on the contract; when he inspected them, he couldn't find any prime hops.

Q. You have been in the hop business, you say, since 1890?

A. Yes, sir.

Q. What other employment have you been in since that time?

A. Oh, I have been mixed up for a year or two at a time in other things.

Q. Practiced law some?

A. Yes, pettifogged a little.

Q. Been admitted to practice law in the State of Oregon?

A. No.

Q. What state?

A. Montana and Washington.

Q. When were you up in Montana and Washington?

A. Eighty-eight and '9, '89 I believe, I was admitted.

Q. What school did you attend?

A. I never attended any school.

Q. Never attended any?

A. Any law school, you mean?

Q. No; any literary institution?

A. Oh, I graduated from the State University here in 1896.

Q. In 1896?

A. Yes, sir.

(Testimony of John M. Edmunson.)

Q. How long were you in school there?

A. Six years in the University.

Q. Then you were raising hops while you were going to school?

A. Yes, sir.

Q. Was it before that that you were admitted to practice law?

A. Before that?

Q. Yes.

A. Oh, no; it was quite a while after that.

Q. It was '98 and '99 you were in Montana, wasn't it?

A. Yes, I was up there about a year in that country.

Q. Now, with reference to this spraying, John, in the other trial of this case, were you not asked this question: "What did you spray them with?" And the answer was, "Soap." And the next question asked you, "What else?" Your answer was, "That is all I used."

A. Well, I think I used the naphthalene in connection with it.

Q. Then your testimony there was not correct?

A. Well, it might have been. I think that I used the naphthalene with it that season.

Q. And the next question was: "All you used was soap?" And your answer was: "Yes." Did you give that testimony at that time?

A. I gave it there if it is correct.

(Testimony of John M. Edmunson.)

Q. Then the next question was: "What time did you spray?" Your answer was: "I don't remember the exact date; along about the first of August, I think."

A. Well, that is perhaps correct. I could not swear within a week of it, or two weeks of it, now.

Q. Then the question was asked you: "Isn't it a fact that you didn't spray until after the first of August?" And your answer was: "I said I commenced to spray along about the first of August. I don't remember the exact date." That was your testimony there. Now, you testified a while ago about the conversation between you and Mr. Hinkle on the first occasion that he was at the warehouse to inspect the hops, somewhere from the first to the third of October, and you stated, I believe, that he made a request for the return of the advances at that time. Was that right? What did he say about that?

A. Well, he said he wanted—he would have to reject the hops under the contract, and he wanted the money back. I don't remember the exact words he used, but that is the effect of the words, as I remember. In other words, he demanded the money back, but what language he used I could not say exactly.

Q. Where did that conversation occur?

A. That conversation occurred outside on the porch of the warehouse.

Q. Who was present at that time?

A. There was not anybody present at that time.

(Testimony of John M. Edmunson.)

Q. Wasn't Mr. Hayes there at that time?

A. Mr. Hayes, was there, but he was not present to hear the conversation.

Q. Now, isn't it a fact, John, that Mr. Hinkle told you then that unless your hops were better than those samples, they could not be taken under the contract?

A. Well, I don't remember all the language we used. We talked quite a lot there. The effect of the conversation was that he rejected them, rejected them on those two samples, that is what he did.

Q. Well, now, just state to the jury what he said about rejecting the hops.

A. He said that he could not take those hops on the contract.

Q. Was he referring to the two samples alone, or all of the hops?

A. The office had samples that I had sent to them along about the middle of the month, or middle of September, as quick as I got through baling or picking, almost. They had more samples than that a good deal.

Q. Now, those samples that you sent down there long before that, which part of the crop were they taken from?

A. I don't remember. I just was up one day and had a sample or two, and I pulled out some samples, wrapped them up and sent them down. They were at, I think it was the last end of the hops. I

(Testimony of John M. Edmunson.)

took them out of the last bale I piled in. I had them stored in Goshen, or I hauled them up there, as I baled, away from the hop house, and piled them in. And the first bales were back over underneath.

COURT:—At this time you say he told you that he could not take those hops under the contract? Did he specify in particular that he could not take them as first quality hops, or did he say he would not take the hops at all?

A. Well, he said that he could not take the hops at all. And I asked him what he could do with the hops, then; and he said that the firm could not handle them at all under any consideration. That was the conversation.

Q. That is not what he said about it, was it?

A. That is what he said. He advised me to go ahead and sell them to somebody else if I could.

Q. Now, what was said about these advances in connection with that conversation?

A. Well, he said that he wanted, expected me to pay the money back; wanted the money; that was what he was after.

Q. What reply did you make to that?

A. I told him that I could not do it at that time.

COURT:—Was that the first conversation?

A. That was about the 3rd of October; the first conversation we had when he took out the two samples.

Q. Well, now, was he insistent on it, your pay-

(Testimony of John M. Edmunson.)
ing back the advances at that time?

A. Well, he put it up in a business way. I don't know whether he was insistent or not. He gave me to understand that he wanted the money; that he could not handle the hops under any consideration at that time; advised me to sell them to somebody else. And I went to work and pulled out some samples that evening and sent them off to the other dealers.

Q. Well, now, according to your judgment at this time, if you had sent in samples from the last end of the picking they ought to have been rejected, hadn't they?

A. Well, that depends upon what last end you refer to, how far you go back.

Q. Well, didn't you testify that those samples you sent down there were from the last end of the picking?

A. Well, I think they were from the last end, yes; some of them.

Q. Haven't you testified here that the last end of the picking were the fullest of mold?

A. Yes, it had more mold in it, as they went along, more and more.

Q. If you sent any samples, then, from the last end of the picking, they ought to have been rejected, hadn't they, under the contract?

A. Well, I don't know as to that. That is a matter of opinion.

(Testimony of John M. Edmunson.)

Q. You admit yourself that they had vermin damage in them, don't you?

A. Well, I was not doing the inspecting and work for them. I couldn't say whether they ought to have been rejected or not. That was their business, to come up and inspect the hops. The contract called for it.

Q. They were full of vermin damage, though, those first samples you sent down?

A. I don't remember whether they were or not.

Q. Did you examine them yourself before you sent them in?

A. I never examined the samples. I pulled them out in the hop-house or in the warehouse, wrapped them up, took them over and shipped them down.

Q. Now, with reference to those advances, John, I will ask you if you were not asked this question at the other trial in Eugene: "Did you agree at any time directly to pay back the \$3,000.00 after they rejected the hops?" And that your answer was: "I never agreed to pay back any money at all. He didn't press the matter on the first occasion; on the second he demanded it." Was that your testimony?

A. That is perhaps right. If this is that way, that is just about the way it was, I guess.

Q. Now, how many firms did you send samples to in October?

A. Oh, I don't know. I didn't keep any track

(Testimony of John M. Edmunson.)
of it.

Q. You sent some to the Seavey Hop Company, didn't you?

A. Yes, I think so.

Q. And some to Harry L. Hart Company?

A. Yes.

Q. Some to the Livesley Company?

A. Yes.

Q. What did you send them the samples for?

A. To sell the hops on.

Q. That was in October?

A. Yes.

Q. What kind of grading or report did you get from Harry L. Hart Company?

A. I got a grading of prime from Harry L. Hart.

Q. When was that?

A. One day when I was in Springfield, along about the first of March.

Q. That was a conversation over the 'phone?

A. Yes, sir; that is the only grading I heard on them at any time.

Q. Didn't Mr. Hart tell you how many he thought were prime?

A. He said the crop would grade prime. I asked him what the crop would grade, and he said prime. That is all I know about it.

Q. Just give the jury an idea of the quality of the hop that you consider constitute the grade.

(Testimony of John M. Edmunson.)

A. Well, I don't know what grade you are talking about. What grade do you want?

Q. First grade; first quality hops.

A. I don't know; I could not grade a first quality hop.

Q. Why not?

A. Because I don't know what a first quality hop is.

Q. Well, what is a choice hop, then?

A. Well, a choice hop is supposed to be about the next grade to the best hop that is grown.

Q. What is the best hop that is grown?

A. Fancy, the hop dealers call it.

Q. Well, give the jury some idea of what a choice hop is.

A. Well, a choice hop—do you want me to define a choice hop?

Q. Yes, I want you to tell me what the qualities of a choice hop are.

A. Choice hop is a good, rich hop, picked fairly clean, and has a good flavor. The richer and fatter it is, the better the hop is. It can be any color so long as it has a rich flavor, rich lupuline in it, which makes the flavor.

Q. How about the evenness of color?

A. Oh, that doesn't make any difference, so much. If it has got the flavor and the richness, why they take them. To define a hop they call choice, it can run through a red tip or green hop or yellow

(Testimony of John M. Edmunson.)

hop, or any kind of a color you want. The main thing about a hop is for it to have a guts in, as the people say.

Q. If there is any mold in a hop, will it be a choice hop?

A. Yes, it can be a choice hop if it had mold in.

Q. If it is just medium picked, what grade would it be as to picking?

A. That depends altogether on the market. If the market is strong, they don't take into consideration picking and a lot of other things. It is pretty hard to grade a hop. The market has more to do with the grading than anything else.

Q. If the price of hops were up to 35 cents for choice hops, wouldn't the picking have something to do with the grading of the hops for the purpose of determining the market price?

A. For a choice hop? No, when prices go up that high, they don't make much distinction. I have sold the rottenest hops I ever raised for the best price. That is my experience—the high price obliterates distinction in grades and qualities.

Q. What year was that?

A. Oh, that was along about 1903 or '04, some time like that. I have forgotten.

Q. Why were they rotten?

A. Why, there was a lot of bales got damp, and there was some hops in there I had to throw off before another floor got hot, and was thrown off slack.

(Testimony of John M. Edmunson.)

One bale weighed, one floor on a 24-foot house weighed about a ton and a half of dried hops, about 13 or 14 bales.

Q. Then you were not an expert drier that year?

A. Well, that was expert drying, because I spoiled one floor some in order to save another. If I hadn't been an expert, I would have spoiled both floors.

Q. How much mold can there be in a hop and still be a choice hop?

A. Oh, a choice hop cannot have very much mold in it. A choice hop can have fly specks and all that.

Q. What do you mean by fly specks and all that?

A. It is mold that looks about like black pepper when you scatter it out, scatter it through the hop. Dealers don't pay any attention to it.

Q. What dealers do you mean, that don't pay any attention to fly speck mold?

A. Hop dealers.

Q. All of them?

A. Yes, all of them.

Q. Did you ever inspect any hops yourself, John?

A. Yes, I have inspected a few.

Q. Whom for?

A. I have helped inspect a good many for Klaiber, Wolf & Netter, different seasons.

Q. Did they take them on your inspection?

(Testimony of John M. Edmunson.)

A. No, I assisted Mr. Hinkle that year.

Q. What?

A. I assisted Mr. Hinkle one year. I helped him inspect a good many of them.

Q. Well, they took them on Mr. Hinkle's judgment, and not on yours?

A. Oh, yes; that is what he was there for. He was their head inspector. I didn't expect them to.

Q. Does mold injure the flavor of the hop?

A. No, I don't think it does, only at a certain stage, when it gets to rotting.

Q. What do you mean by a certain stage?

A. Well, a mold gets into a hop; it will collect dampness in a certain stage, and the hop will rot on the vines when it gets to that stage; why, then the hop is spoiled. Before that stage mold does not hurt the flavor.

Q. What becomes of the mold then?

A. I don't know; it dries away, most of it.

Q. Why is it, then, that they grade hops down that have mold in them?

A. Well, I don't know any reason for grading a good hop down that is rich and got a good flavor and color and all that kind of stuff. Very often the dealers grade them down to take advantage of the grower. It is a trick of the trade. I have been up against that a good many times.

Q. Now, at the time of the second inspection of the hops there in the latter part of October, were you

(Testimony of John M. Edmunson.)

present all the time that Mr. Hinkle was inspecting the hops?

A. Yes, I was right by there.

Q. How many bales did you examine samples in that Mr. Hinkle took out?

A. Oh, I examined most all of them.

Q. What did you do in examining them?

A. Why, I looked at them, looked at the berry, watched him examine and open and inspect; while I was away getting some samples he was inspecting two or three more. When I came back I would look at those. So I saw about every bale that was inspected.

Q. Just tell the jury what you did when you inspected them.

A. Well, I matched them up, looked around to see how they would grade; rub them up.

Q. Smell of them?

A. Smell of them; go through all the motions of a regular dealer.

Q. Did you do that with all of the bales?

A. Yes, sir; just about all the bales. I was watching the inspection pretty close at that time. It was my business.

Q. Did you point out any bales to Mr. Hinkle that you considered first quality hops under the contract?

A. I pointed out lots of good bales to him.

Q. How many?

(Testimony of John M. Edmunson.)

A. I don't remember how many. I didn't fight with him over the inspection.

Q. Yes?

A. What I would say or do at that time would not have any effect on him. He was working under orders and instructions from his firm, I suppose; not under mine. I made several objections and comments along as we went, called his attention to some samples, some tryings. He seemed to be pretty tight on it. He didn't loosen up.

Q. Then you and Mr. Hinkle only differed over a few of the bales. Is that the idea you want to convey to the jury?

A. Only differed on a few of the bales? We differed on a whole bunch.

Q. Well, did you, as you went along inspecting the bales, point out to Mr. Hinkle the ones that you considered choice hops?

A. I pointed out several of them to him.

Q. Well, how many?

A. Oh, I don't know; two or three or four dozen maybe.

Q. Two or three or four dozen?

A. Yes.

Q. That would be 40 or 50?

A. Yes.

Q. Was that all?

A. I don't remember how many I did point out. I didn't quarrel with Mr. Hinkle over every trying

(Testimony of John M. Edmunson.)

that came up.

Q. You and he agreed on a great deal of it, then?

A. We didn't agree on any of it.

Q. What do you mean, then, by stating that you didn't quarrel with Mr. Hinkle over it?

A. Well, there was no use of quarreling with him over it. Mr. Hinkle—I had known him a long time and helped him out. He was doing the inspecting for his firm. I was not. I didn't belong to the firm. They had Mr. Hayes there that year, I think.

Q. Well, I will ask you again to give the jury as near as you can possibly do so, an idea of how many bales you claimed to Mr. Hinkle there came within the definition of this contract?

A. I claimed that enough bales were there to fill the contract; told him so at the time.

Q. How many did you point out to him?

A. Oh, I don't know how many I pointed out. I could not say exactly about that. I don't remember. We were working pretty hard there. There were only three of us inspecting, and we had to handle the whole business; on top and on the bottom, and move them back and forth. It was quite a job.

Q. You did point out, you say, two or three dozen?

A. I pointed out a good many—sufficient, I thought, to call his attention to the fact that I didn't agree with his inspection, and that was as far as I had any desire to go that time, it didn't make any

(Testimony of John M. Edmunson.)

difference.

Q. I will ask you, John, if you were not asked this question in the previous trial of this case: "Did you point out any bales to Mr. Hinkle that you insisted were first quality hops?" And if you didn't answer this: "I didn't point out any bales. I told him that was a good hop that he was inspecting. And he passed it up; said it was not. That ended it so far as that bale was concerned." Is that your testimony in the previous trial in this case?

A. Yees; that is my testimony. I didn't pick out the bale. Sometimes I didn't handle the bale. Mr. Hayes brought out tryings, etc. I didn't know which bale they came out of. It was the tryings that we were inspecting. I didn't pick out the bales; that is, only in that way, indirectly.

Q. Now, you say that there was a row of samples put outside by Mr. Wood and Mr. Irwin, shipping samples, and that you took one of them.

A. Mr. Wood and Mr. Heyer did that work.

Q. Did you send more than one sample to Pilkington?

A. I think so; I think I sent two samples.

Q. Now, in the previous trial of this cause, in identifying the samples that you sent to Pilkington, weren't you asked this question: "Identify the one that you say Wood drew out, the first one you testified about." And your answer was: "That was this sample here, I think. He drew both the sam-

(Testimony of John M. Edmunson.)

ples out. Wood and Heyer pulled two samples; one was a shipping sample and one a test sample, when they inspected the hops the first time; and they re-sampled, and I got another sample." Weren't you asked that question? Wasn't that your testimony in regard to that sample?

A. I suppose so.

Q. Then you were asked this question: "What did you request Wood to do?" Your answer was: "I told him I wanted to get an average sample." Is that your testimony? Then you requested them to pull that sample for you that you sent down to Pilkington.

A. Oh, I don't know whether I requested them to pull it for me. They were pulling out a full line of samples to ship off, and I told them I wanted one.

A. Yes; that is my testimony. I didn't pick. They pulled the samples. Whether I requested them or not I don't remember. Possibly I did. Possibly when they were taking one out of one bale I asked them to pull another out of the same bales. I would not swear to that.

RE-DIRECT EXAMINATION

Q. Mr. Edmunson, you testified that you sent samples to dealers around over the state in October?

A. Yes.

Q. Was that before or after Mr. Hinkle's first inspection?

A. I think that was after; I am not sure.

Excused.

(Testimony of Frank S. Johnson.)

Frank S. Johnson, being called as a witness on behalf of defendant, testified in substance:

Residence, Portland, Oregon; hop dealer by occupation; have had experience in growing hops since 1890; helped my father, who was one of the oldest hop growers in Marion County. In 1890 I ran a yard of my own, that is a rented yard; had experience as a dealer since 1895. I worked on the dealing end, on the road. Was connected with Henry Oppenheimer first; Wolberg; Phil Neis; then I went into partnership with J. W. Seavey under the name of Seavey Hop Company for eight years. I had experience during that time in inspecting and grading hops. Am acquainted with Mr. Edmunson, have known him twelve years or more. Examined samples of his crop of hops for the year 1912. Every year he would always send his own samples down. We never sampled his hops that year, that is up by Goshen. Whether it was four or six samples I don't remember, but I know I graded them as I graded all the hops as they came in. Received samples of his hops in the fall of 1912. Went through the usual form of all the samples that I had. When they would come in, enough to work on, I would take them out on the table and examine them and the bookkeeper, when I would give the grading, would enter them in the books. They were in three grades; there were three lots, I should say. He sent one sample like 140 bales, one 75 bales, and the third 40 bales. That is the way our books show.

(Testimony of Frank S. Johnson.)

The first grade was medium, the 140 bales, the 75 was medium and moldy, and the third was 40 bales medium slackish, that is the way we have it, and there were 16 bales of baby hops, but of course that is all destroyed, all the grading we put on baby hops, that 16 was part of the 40.

Examined what was called shipping samples. We looked at some samples there in the room. I don't remember whether they were out of that lot or what they were.

CROSS EXAMINATION

Question by Mr. Williams:

Q. When did you receive the samples of the Edmunson hops?

A. Well, I could not say. Of course that is a long time ago. I judge it was along around November 1st, something like that. I would not say.

COURT:—1912?

A. 1912, yes.

Q. How many bales did Edmunson have that year?

A. Well, I don't know. It is—according to the book there, it would be a little over 250 I should think. But many times when they send the samples in the bales are guessed at; and when they are weighed up on inspection we find it is not the correct number, many times.

Q. Now, these hops that were graded as medium, what was wrong with them that you didn't grade

(Testimony of Frank S. Johnson.)

them up to the first quality?

A. Well, that is something that I cannot remember now. All I would have to go by is the book.

Q. What are the various grades of hops according to quality?

A. Oh, say common and medium; medium to prime; prime; prime to choice; and choice, is what is customary.

Q. Then there is choice and the prime, and an intermediate grade between choice and prime, is there?

A. Well, that is used by the dealers. Where there is a right good prime, they sometimes say prime to choice.

Q. Where there is no close question about it?

A. Yes.

Q. And then below primes come mediums?

A. Below primes is medium to prime; that is another.

Q. A medium to prime is the half grade?

A. Yes.

Q. Now, there was not any of the Edmunson crop that you graded above medium, was there?

A. Not according to the grading, no. I had the book to go by.

Q. Is this the book that you used in the office?

A. Yes, sir.

Q. Do you find Mr. Edmunson's grades there?

A. Yes, sir.

(Testimony of Frank S. Johnson.)

Q. They correspond with your testimony, do they not?

A. Yes, sir.

Q. 104 bales of medium; and then 75 bales of medium, moldy; and 40 bales?

A. Medium slackish.

Q. And 16 bales of baby hops?

A. Yes.

Q. What grade do you say those baby hops are?

A. Well, we hardly ever put any other grading; just call them baby hops. They are always green, you know.

Q. Then if there were more bales here than Edmunson had that year, there must have been some mistake somewhere in the number of bales?

A. Well, I should think so. Those number of bales should have come from the samples. I don't see any other way they would get on that book, without we was taking them from the samples.

Q. You didn't have 140 samples of medium hops, did you?

A. What was that? I didn't understand that.

Q. You didn't have 140 samples from the 140 bales of medium hops, did you?

A. No, there was not over four or five, six samples, I guess, that he sent in; that is all.

Q. You just estimated the number of bales of that quality?

A. No; I believe that the samples as they came

(Testimony of Frank S. Johnson.)

in must have been samples representing 140 bales; and so many samples representing 75 bales. I think that must be the way that was put in that book.

Q. Well, now, how would they' represent more than one bale, the one bale they were taken from?

A. Well, many times as they bale out they estimate; well, they baled at the first baling which was done, I judge 140. It might not have been that way. It might have been 75 they baled first. You could not tell.

Q. These samples were not sent you as they were baled out, were they?

A. They were all sent at the same time.

Q. Were they sent as they were baled out from the hop house?

A. I don't know that. They came to us, I think, about November 1st, some time there; I would not say surely.

Q. Now, isn't it a fact, Mr. Johnson, that in sending samples they will select out or take ten bales of hops, or about that number, and take one sample from the ten bales, and let that sample represent the ten bales, without any examination of the other nine bales?

A. Well, they do that in inspecting sometimes; and especially in shipping to London, they will string them out in a row and inspect all the way down the line; and then every tenth bale they will take a sample out and send it as a shipping sample. But of

(Testimony of Frank S. Johnson.)

course if it don't run, they don't let it go in.

Q. Who sent you these samples?

A. Mr. Edmunson sent them.

Q. You don't know whether he stuck his tryer in and pulled out some?

A. No, I don't know anything about that.

Q. And selected the bales to represent that sample?

A. No.

RE-DIRECT EXAMINATION

The witness' attention was called to testimony he had given in the previous trial of this case, when samples of the hops were submitted to him; he testified in substance: I remember several samples that were put before me there, and I believe that I said one I would consider to be prime, and I also said, of course, to judge hops in that court room, which was probably darker than this one, and it is necessary to have a steady light, like sky-light, to look at hops. After a colloquy between the attorneys and the court with reference to his testimony, the Court asked: Do you remember what you testified to at that trial in that respect?

A. I remember it was one sample that I said it might be called prime. But this was in June; you was judging, making your examination in June on a 1912 hop; while the grading in November or October would be different on the same hop.

(Testimony of Frank S. Johnson.)

RE-CROSS EXAMINATION

Q. Has mold any injurious effect on the quality of a hop, Mr. Johnson?

A. Well, we find it is hard to sell with mold in. There is complaint from the East; that is what we have got to go by. If a dealer in the East finds mold in the hops he makes a complaint about it.

Q. It affects the market value, does it not?

A. Yes.

Q. Now, would there be any difference between examining a hop for defects in June than there would be in November? That is, if you were examining them for mold, or for unevenness in color, or for any other defect that the hop might contain, would there be any difference in June that there would be in November in examining the hop for that purpose?

A. Well, if the defect was in the way of slackish and moldy, of course next June that would be dried out, so that they would go through better then, and the grading would not be as high and strict then; and they will take hops that has even a little bit more mold in them in June than they would in October—that is our trade in the East.

RE-DIRECT EXAMINATION

Q. Now, Mr. Johnson, I understand from you that by the lapse of time from November, 1912, over to June, 1913, has tested the question whether the mold or slack-dried would be an injury to that hop.

A. Well, it would be an injury to all hops in a

(Testimony of Frank S. Johnson.)

way. Of course, the older they get—but they are still 1912 hops; you can't get around that.

Q. Sure. What I mean is this: Now, if some of these hops were slack-dried, or apparently so, in October, 1912, and objection was made to them at that time—but they were re-examined in June, 1913, and found to be in good condition, then they would pass inspection, would they not, because the supposed injury of slack-dried had disappeared?

A. All the danger of the bale heating would be over by that time. Of course, in October—if there is slackish you run a chance even up till January sometimes that a bale may heat and then turn black.

RE-CROSS EXAMINATION

Q. There would not be any difference, would there, Mr. Johnson, in examining a hop in the court room, than there is in your sample room, if the light is the same?

A. Oh, if we had—we are all used to overhead light, of course.

Q. So that you can examine them better in your sample room than you can in the court room?

A. Yes, sir.

Excused.

Bert Pilkington, called as a witness on behalf of the defendants, being duly sworn, testified in substance:

He is a resident of Corvallis, Oregon; lived there about six years; occupation a chemist; chemist in the

(Testimony of Bert Pilkington.)

State Agricultural College, and employed by the college. Have connection with the Federal Government in a way, for instance I am working, or I am paid directly from a fund that is set aside by the Federal Government to be expended by the Agricultural College. Obtained my knowledge and experience as a chemist at the college and am a graduate of that school; been engaged as a chemist since 1905.

Q. What particular class of work were you doing in 1913?

A. Well, in 1913 I was still working on some hop work that we had begun about 1910.

Q. Please explain the character of that work.

A. Well, it was rather varied. It covered a large scope of the hop work.

Q. Just the general features of it.

A. Well, for instance, one of the particular features of it was a revision of the methods for chemical examination of hops. And I might say, by way of explanation on that, we gathered together all the methods that were obtainable at that time, and compared those, and from that we worked out a method of our own. That is, simply worked over some of these other methods. While we didn't claim originality for a large part of that, there were one or two changes that we did make ourselves in them.

Q. What was the final object in obtaining this process of chemical analysis?

A. The thing that led up to that was the varia-

(Testimony of Bert Pilkington.)

tion, or so-called variation, in the examination or the commercial judging of hops. And the attempt at that time—it was taken up as an Adams project, under the Adams fund, by the Federal Government—to see if they could arrive at some definite method for examining hops, whereby hops would be given examination according to their worth. By that I mean that, in grading of hops by the commercial grading, if the judge knows as to where that hop is grown he can give it a different grading or the commercial value is different than if it comes from some place that has not grown many hops, for instance; that is, it is not strong in the hop industry.

Q. You are acquainted with Mr. John Edmunson, the defendant in this case, are you?

A. Yes, sir, I am.

Q. How long have you known him?

A. I first met Mr. Edmunson, I think, about 1905.

Q. Did you examine some samples of hops that he sent you in 1913?

A. Yes, sir, I did.

Q. About what time in the year was that?

A. That was somewhere between the first and the 10th of June, if I remember right. I don't remember the exact date.

Q. Now, did you make a chemical analysis of those hops to ascertain the amount of brewing quality in them?

(Testimony of Bert Pilkington.)

A. Well, the chemical analysis shows the resin quantity.

MR. WILLIAMS:—Just a moment. We object to the witness testifying further in regard to what that analysis showed, your Honor.

COURT:—You can answer whether you made such analysis.

A. We did.

MR. WILLIAMS:—We desire to make the objection to this witness' testimony along that line for the reason that it is incompetent, irrelevant and immaterial, and an attempt to impose in this case a standard different from that of the hop men themselves.

COURT:—There has been testimony here, coming from the witnesses produced by the plaintiff, touching the amount of resin, or pollen, as it has been described, or lupulin that is contained in these hops, some saying that it had more and some less; and that seems to be the prime quality of the hop. If this witness is competent to testify concerning the quantity of that lupulin in the hops, or the specimens that he examined, I think that would be proper to go to this jury. You may proceed.

MR. BEAN:—We save an exception.

Q. Now, Professor Pilkington, you said you made a chemical analysis of these hops?

A. That Mr. Edmunson furnished me?

Q. Yes.

(Testimony of Bert Pilkington.)

A. I did.

Q. And according to the scientific method used for that purpose?

A. Yes, sir.

Q. Now, what percentage of resin did you find in these hops?

Objected to as incompetent, irrelevant and immaterial.

COURT:—I think I will hear that. The objection will be overruled.

MR. WILLIAMS:—We desire an exception, your Honor.

COURT:—Very well.

A. Why, the sample Mr. Edmunson handed me had 18.15 per cent total resin, and of that total resin there was 16.24 what is known as soft resins.

COURT:—What?

A. Soft resin. You might say there were three resins in the hop.

Q. What was the third resin?

A. That is what they call a hard or worthless resin. That amounts to the difference between the total resin and the soft resin; three resins comprising the makeup of that part of the hop.

COURT:—What is that difference?

A. The difference is about 1.9 per cent—.92, something like that.

Q. You may state now, if you know, what relationship the resin has to what is usually called lupulin

(Testimony of Bert Pilkington.)

in the hop.

A. Well, they have what they call a lupulin granule, and the resin is contained in the lupuline granule, so that if there is no lupulin there, you haven't any chance for resin.

Q. Now, at the time you made this examination, had you made any extensive analysis of hops in the manner that you examined this particular sample?

A. Yes, sir. For instance, all the—

COURT:—Just confine your answers to the question.

A. All right.

Q. Did you ever make any examination of this kind of hops that are pronounced by experts as choice hops?

Objected to as incompetent, irrelevant and immaterial.

COURT:—Do you know what a choice hop is, in your experience; that is, choice hop measured by the commercial rule?

A. No, sir, I do not.

COURT:—You do not?

A. No, sir.

MR. SLATER:—Your Honor, I want to show that the percentage of resin found in this particular sample of hops—its relation to the percentage found in the hops of different qualities that he examined.

COURT:—Well, unless he knows the percentage that exists in the commercial hop of the different

(Testimony of Bert Pilkington.)

qualities, it doesn't seem that he would be competent to testify. If you can show by this witness that he is acquainted with commercial hops, and the amount of resin, for instance, in a prime hop, or a choice hop, or a medium hop, then his testimony would be competent on that point.

Q. I will ask you, Professor, if you made chemical analysis, at the time you examined this particular sample or prior thereto, of samples of commercial hops, to ascertain the amount of resins therein?

A. Yes, sir.

Q. And how many different qualities or kinds of hops did you examine in that way—commercial hops?

MR. WILLIAMS:—Objected to as incompetent, irrelevant and immaterial. The witness shows that he doesn't know what the different qualities, the different grades of hops are.

COURT:—He says he made examination. We will see how that develops a little further. I will overrule the objection for the present.

MR. WILLIAMS:—We desire an exception.

Q. Now, where did you get these various samples from that you examined in this way?

A. They were sent in from different hop dealers.

Q. In this state?

A. Yes, sir.

Q. Name some of them.

A. T. A. Livesley, in fact, furnished us most of

(Testimony of Bert Pilkington.)

our samples; and Mr. Seavey, at Eugene, furnished part of the samples; Mr. McLaughlin, at Independence, furnished us with some samples. And then outside of that, of the locally grown hops, we examined hops from Washington state, from Mr. Horst, of California, Wisconsin hop; New York hop; English hop; and the Salz hop, or the German hop.

Q. You understand that those were hops that were used in commercial business?

A. Some of the hops contained a grading with them.

MR. WILLIAMS:—I move to strike that out.

Q. I don't want that. I want to know if these hops came from a source that you can testify that they represented commercial hop?

A. Yes, sir, they had been cut out of a bale.

Q. Well, I will have to make a leading question. Did you ever receive any samples from brewers in this state of hops for examination?

A. No, not from the brewery. By the way, I won't say whether it is from Pabst brewing people that we got the Wisconsin hops, or just the persons named. I don't recall.

Q. You don't remember of receiving any samples from brewers of this state?

A. No, not from this state, no.

Q. How many different samples of this kind, that you received from the dealers in this state, have you examined?

(Testimony of Bert Pilkington.)

Objected to as incompetent, irrelevant and immaterial.

COURT:—I will overrule that objection for the present.

MR. WILLIAMS:—Allow us an exception.

COURT:—You may have an exception.

Q. Now, what different qualities of hops were these samples that you received, represented to you to be, by those who gave them to you?

MR. WILLIAMS:—Objected to as incompetent, irrelevant and immaterial; matter of hearsay. The witness was not competent to judge.

Objection overruled. Exception allowed.

A. Do you mean by that the grading?

Q. Yes; what quality of hops were they claimed or styled to be?

MR. WILLIAMS:—I desire to renew our objection, your Honor.

Objection overruled. Exception allowed.

MR. SLATER:—That will be understood.

A. Why, some of them were graded fancy, some choice, some prime, some medium. I don't think we had a sample marked "poor" in the entire lot.

COURT:—Do you know what a choice hop is in the market?

A. I couldn't go out in the market and pick up a choice hop, just by going around and feeling of it, or looking at it.

COURT:—Do you know the amount of resin

(Testimony of Bert Pilkington.)

there should be in a choice hop, as sold in the market?

A. That would depend on who judge the hop.

COURT:—That would depend on what?

A. That would depend on who graded the hop, whether it was a choice hop, or prime hop, or medium hop. That was what this work was for. I might say in explanation, what this work was for was to compare these different gradings by different judges.

COURT:—Then there is no uniformity in grading?

A. Not according to these different judges; they don't agree.

MR. WILLIAMS:—That is the very vice, your Honor.

COURT:—That is the kernel of the cocoanut in this case, it seems to me, the very thing we are trying to get at now. Do you know generally what a choice hop is in the market?

A. Well, now, by that question do you mean simply the amount of resin that that might contain, or just the general appearance?

COURT:—No; what would be considered by commercial judges a choice hop in the market?

A. Well, nothing only by comparison, looking at every grading.

COURT:—You have got to take those as to whether it is choice or not choice?

(Testimony of Bert Pilkington.)

A. How is that?

COURT:—Now, if you know what a choice hop is in the market, why, then you can measure your chemical analysis of your resin in the hops you have examined with choice hops. Otherwise, I don't see that we can get a correct estimate in this case upon this particular question.

MR. SLATER:—Your Honor, I think his testimony may be relevant to show the percentage of resin in this particular hop as compared with other samples of hops known in the market as choice, medium and prime, the percentage that might be in them. It is true this witness might not be competent to testify that he can pick out a choice hop.

COURT:—He says he doesn't know, of his own knowledge, what a choice hop is; nor a prime, nor medium. He says what knowledge he has comes from samples of hops that have been sent to him, which have been represented to be so and so. Then he says the judges themselves don't agree upon what is a choice hop, and the amount of resin that should be contained in a choice hop. That is the trouble in making the comparison here.

MR. SLATER:—Well, your Honor, in order to make the record then, we desire to show by this witness that this witness made chemical analyses of a large number of different grades of hops, and that the averages run from 13.49 per cent; and that the minimum percentage for the year in which he made

(Testimony of Bert Pilkington.)

the examination in question was 15.54 per cent; the maximum was 20.49 per cent, and the average 18.06 per cent. That is the testimony that we offer to show by this witness.

COURT:—You don't know, of your own knowledge, about the samples, whether they were choice or prime or medium as to quality?

A. No. We didn't care for that on this other work we were undertaking. We asked—if I may make an explanation there—

COURT:—Yes.

A. We asked that these judges, or asked Mr. Livesley, to send us in a sample of hops judged by different judges, and then we wanted to analyze those hops, and see how those judges agreed. Now, that was the object of that piece of work that we undertook at that time. Now, those hops were graded according to the terms on the hop market.

COURT:—You were inquiring only as to one quality, and that was the quality of the amount of lupulin?

A. No, I might say this—well, that was the standard by which we were measuring; that is, the resin—to see if the resin in a choice hop graded by Judge No. 1 would agree with Judge No. 2, or whether medium graded by one judge, a hop graded by one judge as medium would have the maximum amount of resin equal to a choice hop graded by another judge; to see if a medium fell in a definite class—if

(Testimony of Bert Pilkington.)

their judgment compared as to the amount of resin it contained.

COURT:—I don't think that that elucidates anything in this case particularly. I will sustain the objection, and you may have your exception.

MR. SLATER:—Very well. There is one other question I will put to the witness.

Q. Did you make an analysis of the samples sent you as to the cleanliness of picking?

A. By Mr. Edmunson?

Q. Yes?

A. Yes, sir, I did.

Q. You may state what that was?

A. Well, that was 3.62 per cent of leaves and stems.

COURT:—Out of 100?

A. That had that percentage of leaves and stems in the sample.

Q. Now, how did that average compare with other percentages of other samples that you examined?

MR. WILLIAMS:—Objected to as incompetent, irrelevant and immaterial. That doesn't show whether they were cleanly picked or dirtily picked.

COURT:—I think I will hear that.

MR. WILLIAMS:—The average of the other samples—it is not shown here that those other samples were cleanly picked, or what is cleanly picking; what the percentage of cleanly picking would be.

(Testimony of Bert Pilkington.)

COURT:—It is not very specific, but I will hear that testimony.

MR. WILLIAMS:—We desire an exception, your Honor.

COURT:—Very well.

A. Why, as I said, this sample contained 3.62 per cent of leaves and stems; and they run all the way—some samples I have examined have had less than that, while some have had as much as—oh, about six times as much.

COURT:—Do you know whether those samples with six times as much were of the commercial commodity?

A. Well, I might say that all these hops that we were gathering were supposed to be commercial hops.

COURT:—Supposed to be? You don't know?

A. No. All we had to do was take the other person's word for it that sent us these samples.

Excused.

COURT:—Is Mr. Pilkington here?

MR. SLATER:—He was out in the hall a moment ago.

COURT:—I think I will take his testimony in regard to the amount of resin in the samples. After thinking that matter over, I think it would be a better ruling to let that go to the jury.

MR. WILLIAMS:—We will take an exception, if your Honor please.

(Testimony of Bert Pilkington.)

COURT:—You may have your exception.

BERT PILKINGTON.—Resumes the stand.
Direct examination continued.

COURT:—I have concluded that you might answer as to the amount of resin you found in these different samples. I think the manner in which you obtained the samples has been sufficiently explained heretofore. You may have your objection, and your exception to the Court's ruling.

A. Well, I cannot give the percentage offhand of the amount of resins in each hop separately.

Q. Have you any memorandum, or publication issued by yourself, that contains the data that you made?

A. Why, I think that Mr. Edmunson has such a publication. I have none with me.

COURT:—Well, you may refresh your memory then.

Q. I hand this pamphlet to you. State who prepared the data that is contained therein.

A. Why, this is merely a publication of a record of the work that I did at the Agricultural Station.

Q. Did you prepare the material?

COURT:—I think you better confine yourself to these samples that he said he got from the different parties, to which he testifies heretofore.

MR. SLATER:—That is what I intended to do, but I just want to use what material he has there

(Testimony of Bert Pilkington.)

to refresh his memory. I want to make proof of the genuineness of the memoranda is all.

Q. Now, did you prepare the data that is published therein?

A. I did, yes, sir.

Q. And you know that it is accurate?

A. Yes, sir.

Q. Now, you may refresh your memory by referring to that to ascertain the amount, the percentages in these different samples of hops that you made an analysis of.

A. Of those that were marked by those judges that were sent in? Is that the understanding?

Q. I think so, yes.

COURT:—Yes, it must be that. You understand you are to confine yourself to the samples you have testified to heretofore that were sent to you.

A. That is what I have, yes, sir. I might say that there are nineteen samples here, and to start in to memorize those things or say that I can repeat it off with the gradings, I cannot do that offhand.

COURT:—You may refer to the memorandum.

A. All right. I am allowed to read the classification of these hops that is given here by the judge that sent it in?

COURT:—Let me see what it is. Read from it.

A. The hops are classed here in the different grades. For instance, a note at the bottom here says: "The terms used in the commercial grading rank in

(Testimony of Bert Pilkington.)

the following order: Fancy, strictly choice, choice, strictly prime, prime, good medium, medium, and poor."

COURT:—Well, now, who are the judges?

A. I don't know who the judges were. Mr. Livesley furnished these samples. The pamphlet there states how those samples were procured and the object of getting those. These samples were numbered, and the grade was put with that number in the letter sent to us, and the samples forwarded at the same time.

Q. Is Mr. Livesley a regular dealer in hops? in this state?

A. Yes.

Q. An extensive dealer?

A. He was at that time, yes. There is the table which I referred to.

COURT:—Prime, according to this table, would vary all the way from 15.95 per cent to 20.19 per cent total resin?

A. Yes, sir; and varies in the grading there. The grading is put opposite each sample, and then the judges is on the side margin.

COURT:—Well, you can read from that as to the prime and medium. There is no choice. Yes, there are two choice here.

Have you examined this table, Mr. Williams?

MR. WILLIAMS:—I have not, your Honor.

COURT:—Look at it.

(Testimony of Bert Pilkington.)

MR. SLATER:—I would like to ask the witness another question.

COURT:—Very well.

Q. Do I understand you that Mr. Livesley furnished all these samples?

A. Those samples that are given there? No, Mr. Livesley did not furnish all the samples. Mr. Seavey furnished part of the samples. If I remember right, the larger number of the samples were received from Mr. Livesley.

MR. WILLIAMS:—We are of the opinion, your Honor, that the information there, that could be elicited from the witness.

COURT:—I think you may give the names of gradings according to the samples sent you, the judging of those samples. Just give the general range. Take the prime, for instance. Take the choice, for instance, and then prime, and indicate it.

A. All right. One sample of choice hops by Judge No. 1, 1911 crop, contained 19.42 per cent total resin; and the other sample of choice hops, by Judge No. 2, 1911, contained 19.46; and the other sample of choice hops, by Judge No. 3, 1911, contained 19.98 per cent total resin.

COURT:—Now, give the prime.

A. Prime, 1911, by Judge No. 1, contained 17.23; next prime, by Judge No. 1, 1911, contained 18.83 per cent; and the next prime, by Judge No. 3, crop 1911, contained 20.49 per cent; and the next prime, Judge

(Testimony of Bert Pilkington.)

No. 3, 1911 crop, contained 20.19 per cent; the next prime, 1911 crop, Judge No. 3, 19.42 per cent.

COURT:—What was that that contains 15 per cent?

A. I haven't come to that one yet. I will get that in just a minute. No. 2 Judge, 1911 crop, prime 19.04 per cent. Now, prime, 1910 crop, by Judge No. 1, 15.95 per cent total resin.

COURT:—So the prime varies all the way from 15.95 to about 20 per cent.

A. To about 20½.

COURT:—Well, now, give the medium.

A. Medium—we have only two mediums. They are both 1910 crop. One is 17.21 per cent, by Judge No. 1. Another one is 13.46 per cent, by Judge No. 1.

COURT:—I think that is sufficient.

CROSS EXAMINATION

Questions by Mr. Williams.

Q. You don't know anything about whether or not these were properly graded as choice and prime, did you?

A. Which, these samples here?

Q. Yes, of your own knowledge?

A. Nothing only that the judges sent these in marked so and so, from Mr. Livesley, marked samples marked so and so.

Q. That is all you know about it?

A. Yes, that is all I know about it.

Q. You didn't testify about the other samples,

(Testimony of Bert Pilkington.)

that John Edmunson sent you?

A. How is that?

Q. You didn't testify as to the amount of resin in the other sample John Edmunson sent you?

A. The second sample?

Q. Yes.

A. I did at the other trial, if I remember right.

Q. How much was there in that?

A. There was seventeen and some, if I remember, seventeen and some hundredths per cent total resin.

Q. Those samples that you examined there were from the crop mostly of 1911, were they?

A. I think the larger number of them were for 1911.

Q. And some from 1910?

A. Some from 1910.

Q. None of them from 1912?

A. I think there's some 1912 in there.

Q. Well, do you know it?

A. Well, I can tell by looking.

Q. Well, look and see.

A. No, there is no 1912 sample in here. No 1912 sample in this lot.

RE-DIRECT EXAMINATION

Q. You referred to a second sample that you analyzed for Mr. Edmunson. Do you know how long that sample had been drawn and the condition of it?

(Testimony of Bert Pilkington.)

A. Well, he told me that was a shipping sample.

Q. I don't want what he told you, but did you see any difference in the two samples as to moisture, and the way it had been preserved?

A. The analysis showed that there was a difference in moisture.

Q. What difference was that?

A. There was six per cent moisture in that second sample, or what we termed the dry sample that Mr. Edmunson furnished.

Q. That was known as the dry sample?

A. That was known as the dry sample.

Q. How much moisture was in the other?

A. Seven and one-half.

Q. Well, would the analysis show any deterioration on account of the time that the sample had been exposed to the air, or after it had been drawn?

COURT:—I didn't intend to open up this case again.

MR. SLATER:—Counsel has injected some reference to another sample that we didn't offer. He may have to explain that.

COURT:—Very well.

A. Well, the condition of the sample was noticeably different from the other sample; much drier. It didn't appear to have the life to it that the first sample did have.

Q. Well, but can you state from your scientific knowledge as to how rapidly a hop deteriorates from

(Testimony of Bert Pilkington.)

age and from being exposed to the air after being taken out of the bale?

A. Not the exact amount. But I can state the fact they do deteriorate.

Q. State generally as to how rapidly they deteriorate?

A. In explanation of that, I will say that in the beginning of the work we analyzed a sample there, and left it lying around the room two years. That sample had deteriorated 25 per cent in the total percentage of soft resin at that time.

COURT:—He is not asking about resin. He is asking about moisture.

A. I didn't understand, your Honor.

MR. SLATER:—Yes, that is what I was asking, that is, the resin.

MR. WILLIAMS:—To save the question, we move to strike out all the testimony of this witness, as being incompetent, irrelevant and immaterial, and assuming that a hop that contains eighteen per cent and a fraction, whatever it is, is a choice hop, or a hop that is of a first quality under this contract.

COURT:—The motion will be overruled. You may have your exception.

JUROR:—Can we have the first percentage once more, of the sample of Mr. Edmunson?

COURT:—Very well, you may give that, Mr. Pilkington.

A. The first sample offered in evidence this

(Testimony of Bert Pilkington.)

morning?

JUROR:—Yes.

A. Eighteen and fifteen hundredths per cent.

Henry L. Edmunson, being called as a witness on behalf of defendants, being duly sworn, testified in substance:

I am a brother of the defendant; live in the neighborhood of his farm in Lane County; was there in 1912; live about a quarter of a mile from him; the difference between our farms; am engaged in the business of raising hops; have been for about 20 years; was on the defendant's place during 1912 while his hops was growing frequently, probably on an average of every 10 or 12 days, something like that; observed the manner he cultivated and harvested his crop that year, it was handled in a careful and husbandlike manner like a good farmer would do; it was plowed and cultivated, trained and sprayed properly. He sprayed about the last of July. He handled the hops in the usual way when drying and picking them; they were picked in a careful manner and dried good—dried proper. Was present when a conversation was had about the 12th of March, between my brother, the defendant, and Mr. Wood, who inspected the hops and took them in. He said, with reference to the quality of these hops, about 20,000 pounds should have went on the contract. Mr. Wood said that.

(Testimony of Henry L. Edmunson.)

CROSS EXAMINATION

Witness continued in substance:

I have a hop yard of my own, and cultivated it in 1912, attended to the cultivation of my own yard and the picking and drying of the hops. I didn't pick my hops until after John was through, I used his pickers. I was in his yard a good deal of the time while he was picking his hops, just looking around every two or three days. I hadn't anything particular to do at that time. The picking didn't look dirty to me. I was just looking around, like any observer would going around interested in that line of business. I was in the hop house while he was drying probably three, four or five times, somewhere along there, don't just remember. Observed particularly how the hops were dried. I observed probably eight or ten kiln, something like that. There were always from six to seven or eight bales in a kiln. Was in the hop house when he first commenced picking, after the first day or two until he finished up—all through that time. They dried probably eight or ten floors; I saw the hops on the floor that would make probably 100 bales. He had three floors, three kilns. Examined them practically every time I would go there. and would be there maybe an hour sometimes. It took from 15 to 18 hours to dry a kiln.

Frank Heyer, being called as a witness on behalf of defendants, being duly sworn, testified in substance:

(Testimony of Frank Heyer.)

My business is buyer of hops; been in that business about 15 or 18 years; was employed in 1913 by Harry L. Hart; was at the warehouse where the Edmunson hops were stored at the time they were inspected by Mr. Hart; heard a conversation between Mr. Wood and Mr. Edmunson; heard him (referring to Mr. Wood) say that some of them run pretty nice.

Q. Well, at that time, did you hear Mr. Wood say to Mr. Edmunson that there were 20,000 pounds or over of the hops that ought to have been taken on the contract?

A. Well, now, I don't know. It seems to me like there was something said to that effect, but I could not say for certain; but there was something said similar to it, don't remember the exact words.

The hops were shipped to London. I have had considerable experience in judging hops, taken in a good many thousand bales; examined the hops at that time, looked at them.

Q. Now, you may state to the jury what, in your opinion, was the quality of these hops?

A. Well, now, Mr. Wood, he was the main man, and he said there was at least twenty—

Q. We want your judgment, not what Mr. Wood said about it.

A. My judgment—I considered there was 20 to 25 thousand pounds good prime hops. Some of them were even better than prime.

(Testimony of Frank Heyer.)

Q. What is the quality above prime?

A. Prime would be prime to choice, and then choice.

Q. Do you think as much as 25,000 pounds of that was that class?

A. Between twenty and twenty-five thousand, yes, sir.

Q. What grade would you put on the others?

A. Well, the others was graded as medium.

Q. Do you know how these hops were shipped?

A. Well, I noticed we marked them all up there together—ordered a couple of cars, I think. I was there when we loaded one car. I would not say for certain. I think the cars was both there, yes, sir; loaded them right there.

Q. Do you know whether, about whether they were shipped as one lot?

A. I think they were.

CROSS EXAMINATION

Witness testified in substance:

Went out to examine the hops, Mr. Wood and I went out together. We just naturally inspected the hops. I helped right along, carried out all the tryings, and took out the samples and was right there, seen every bale. Did not grade them myself, I helped. I looked at them, Ross, Mr. Wood, different times wanted to know what I thought of them. I arrived at the conclusion that there were twenty to twenty-five thousand pounds of prime hops, because I in-

(Testimony of Frank Heyer.)

spected the hops; helped inspect them; arrived at the quantity because we weighed them.

Q. Now, isn't it a fact that there were 80 bales there of the best grade of that year's crop?

A. There was something over 100 bales—I could not say now. I think there was either 105 or 110 bales. I could not just remember exactly now, but there was something over 100 bales.

Q. Mr. Wood and Mr. Irwin testified, both of them, that there were 103 they put in the first, better grade.

A. Well, I would not say.

Q. That there was a little over 19,000—between 19,000 and 20,000 pounds.

A. Then there is a difference of opinion, you see. I consider there was twenty to twenty-five thousand pounds at least.

Q. I wanted to get how you arrived at that conclusion.

A. The reason why was because there was some of them I didn't think had anywhere near as much mold in as Mr. Wood thought, see?

Q. They had mold in them, then?

A. Yes, sir; that latter part of them, yes.

Q. Well, now, how about the first part?

A. Well, there was not enough mold in it to speak of—just what we would call a sprinkling of mold in it.

Q. How did the mold get there, Frank?

(Testimony of Frank Heyer.)

A. Well, that is sometimes caused by lice; sometimes it is caused by fog and sultry mornings. It is not caused altogether by lice, because lots of times we have mold in the yards when there is sultry mornings; and fogs cause mold to to the hops, especially when they begin to get ripe towards the latter end of the picking.

Q. Now, you were not grading these hops for Mr. Hart, were you?

A. Ross Wood and I, yes, sir.

Q. They were taking Mr. Wood's judgment on them, were they not?

A. I suppose they might.

Q. Isn't it a fact that you have been buying considerable for Mr. Hart from time to time?

A. Yes, sir.

Q. And that they never allowed you to judge of the hops alone?

A. Yes, sir, I have taken in hops for Mr. Hart alone. And I am buying now for Mr. Livesley, and I am taking in hops; yes, sir; he takes my inspection.

Q. I want you to answer my question.

A. Yes, sir.

Q. Did Mr. Hart ever permit you to make the grading on any lot of hops by yourself?

A. Well, he generally—as to the grading, yes; and he tells me—if I don't agree with him on grading, why, then, of course, it is up to him to decide, of course; certainly; because he is the man I am work-

(Testimony of Frank Heyer.)

ing for. If he would not accept my grading, he would soon let me know.

Q. How many bales were there that you say were prime hops?

A. Prime hops. I would judge there was 130 to 135 bales.

Q. One hundred and thirty?

A. One hundred and thirty to 135 bales, yes.

Q. You didn't make any count of them, did you?

A. Well, pretty close. I kept pretty close watch.

Q. How did you keep close watch?

A. By inspecting them.

Q. Did you put down the number and count them as you went along?

A. No, sir.

Q. Were there any prime hops went into the second car?

A. In the second car?

Q. Yes.

A. Well, now, I would not say, because, as I say. I was not there when they loaded them.

Q. Well, then, you were not there all the time when they inspected them to load them?

A. Well, we don't stay there till the last bale is put in the car. Lots of times we ain't there at all. That is the warehouse man's duty, to load the hops. All we do is to inspect them and weigh them up and mark them. That is all we have to do with it. The warehouse man attends to the rest of it.

(Testimony of Frank Heyer.)

Q. Well, now, as soon as you got through with the first car, were they loaded?

A. No, I don't think so.

Q. When did you inspect them with reference to the time of loading the cars?

A. The time. Well, as I told you before, I don't know exactly whether they was shipped out the same day we inspected them. I could not swear to that. But I know the cars was there.

Q. Wasn't the first car being loaded while you were inspecting them?

A. That might have been. I won't say, because—I know the cars was there, but I could not say; it has been so long ago. I don't remember those things.

Q. You don't have very much of a clear recollection about it?

A. Well, I don't put those things down, no. But I remember the cars being there.

Q. Well, was there more than one carload of what you call prime hops?

A. There was not anything said—I didn't pay any attention to the bill of lading.

Q. How many bales were free from mold?

A. Well, I would judge there was 130, or 135.

Q. Free from mold?

A. Well, not exactly. As I told you, there was some of them had a sprinkling of mold. But there is lots of the hops that have a very little sprinkling of mold. It is not hardly mentioned.

(Testimony of Frank Heyer.)

Q. Then there was mold that run through all of the hops?

A. Very little of it; very little of it.

Q. What do you mean by a sprinkling of mold?

A. Well, that is just where now and then you see a burr that is just affected the least bit by mold. You can just merely see it. It leaves little dark spots in the petal or inside of the burr.

Q. How many burrs in each bale did you inspect?

A. Well, I didn't count them. That would be a pretty hard job, you know—count every burr.

Q. How long were you inspecting them?

A. We was there, I would judge, nearly all day. I didn't put down the time. I judge it would take us—I think it was 250 some odd bales—nearly that time.

Q. Did you test the hops any by chewing them?

A. No; no, they are too bitter for that.

Q. Too bitter?

A. Yes.

Q. Did you test them any by smelling them?

A. Yes.

Q. All of them?

A. Well, I would not say every bale, but nearly all of them. Yes, because I took every—if I remember, I don't think there is anybody else took a handful of tryings out there. And the man that takes the tryings out—as a rule if he is interested in hops

(Testimony of Frank Heyer.)

he is very apt to smell of them, see how they smell, see?

Q. Weren't some of them stewed, Frank?

A. No. There was nothing said about stewed hops.

Q. What is that?

A. We didn't find any stewed hops, nor we didn't find any slack hops.

Q. Didn't you find any slack hops that had been rebaled, some 25 or 30 bales?

A. I think there was 16 bales that John rebaled, but they were not slack. They were redried and baled, see; but they were not slack after he baled them.

Q. Did you ever raise any hops yourself, Frank?

A. No, sir.

Q. Were you there, Frank, when Mr. Wood and John were discussing the question of price of the hops?

A. Well, I know Mr. Wood and Mr. Edmunson got to talking; I think it was on the lower grade, the latter part of the picking. And I know that Mr. Wood called Mr. Edmunson to one side, and I didn't think it was any of my business what they was talking about, so I didn't hear any of their conversation.

Q. Well, you knew that the price of part of them was to be 14 cents?

A. Yes.

Q. And the balance 10 cents?

(Testimony of Frank Heyer.)

A. Yes. There was somewhere near 20,000 taken in at 14; I remember that.

Q. And the balance were 10 cents?

A. Yes.

Q. Now, how many primes went into the 10 cents?

A. Primes? Pretty close to 20,000.

Q. At 10 cents?

A. At 14 cents.

Q. Oh, well, were there any primes went at 10 cents?

A. Well, there might have been.

Q. You don't know about that?

A. Well, I know—

Q. Were you there when Mr. Wood graded them into the two classes?

A. Yes, sir.

Q. Now, did he put any primes in the second class?

A. Well, he might have.

Q. Well, do you know? You saw him, didn't you?

A. Well, they wouldn't take my grading, because they are doing their own grading, see; like you work for somebody else—you can't do as you please.

Q. Well, you didn't pay so much attention to it?

A. Well, I pay enough attention. But then, you know, what I say doesn't count, see? It is the deal-

(Testimony of Frank Heyer.)

er's word that counts.

RE-DIRECT EXAMINATION

Q. You spoke about a slask hop?

A. Yes, sir.

Q. How many bales were there of those slack hops?

A. I didn't see any slacks.

Q. Did you take any samples out of No. 4 bales marked by Hinkle?

A. Yes, when we inspected them. I didn't know Mr. Hinkle—he had them inspected and I didn't know. He had four different grades according to the number of figures on the bale; and I asked Mr. Edmunson there what that meant, and he said, well, that meant four different grades.

Q. How many bales do you remember were marked No. 4?

A. No, I could not say.

Q. But there were some marked?

A. Yes.

Q. Do you know that those were slack hops?

A. No; they was not slack when we received them.

Q. You got samples out of those slack hops?

A. Yes, we tried every bale.

Q. Now, did you use that as a shipping sample to England?

A. Yes, sir.

(Testimony of Frank Heyer.)

RE-CROSS EXAMINATION

Q. How long have you known John?

A. Mr. Edmunson?

Q. Yes.

A. Oh, I don't know. I have known him, I guess, 15 or 16 years, maybe longer. I could not say now. I have known him, yes, just about that length of time, 15 or 16 years.

Q. You have been pretty close friends with John during that time?

A. No, not particularly, no. I don't know as ever bought his hops only but once—once or twice.

MR. SLATER:—With permission of the Court, I would like to ask one more question.

RE-DIRECT EXAMINATION

Q. Are you the gentleman that made the contract of purchase of these hops with Mr. Edmunson?

A. Yes, I bought them. Mr. Hart told me to try and make a deal with Mr. Edmunson. And I made the deal.

Q. Now, you state to the jury what you agreed to pay Mr. Edmunson for all these hops.

A. I bought them on two different qualities, on two different samples. And Mr. Hart told me that he could give Mr. Edmunson 14 cents for certain samples, and 12 cents for the poorer sample.

RE-CROSS EXAMINATION

Q. Why didn't you pay them 12 cents for the poorer sample, Frank?

(Testimony of Frank Heyer.)

A. I don't know. I could not say that—because either the hops were not right, or else the market might have been off a little.

A. R. ZELLER. Recalled for plaintiff in rebuttal.

DIRECT EXAMINATION

Questions by Mr. Williams.

Mr. Zeller, Mr. Edmunson testified when he was on the stand, that at the time the contract was signed up it was understood between him and you that you were to take prime hops under this contract; that is, hops of the grade of prime. What is the fact about that?

A. It is not true; according to the grade of the contract itself, is the only thing that was ever mentioned.

COURT:—The contract would control in this case; not what the parties said about it.

MR. WILLIAMS:—That is true, your Honor. He got that testimony in before we had an opportunity to object to it. It is not true.

COURT:—Very well.

H. A. Hinkle, being recalled in rebuttal, testified in substance:

Have had possibly fifteen years experience in growing hops. The purpose of spraying hops is kill-in vermin, lice and honey-dew that may appear on the hops. Honey-dew is from the effects of lice. Have given the subject of spraying hops a good deal of at-

(Testimony of H. A. Hinkle in rebuttal.)

tention. The best success that I have had from spraying was from about the 20th of June and from that on according to the appearance of lice, but the best results is the latter part of June and the first of July.

Q. Is there any particular time recognized by hop men, growers of hops, as the best time for spraying?

A. The latter part of June and the first of July, yes, sir.

Q. Well, now, if they are not sprayed until the latter part of July or the first of August, what will be the effect at that time?

A. If the hops were lousy and honey-dew had appeared at that time, spraying would be of very little value, because it would make a tendency to drive the lice into the burr and cause them to decay that much sooner. And it is very poor policy to spray that way.

Q. How many times is it necessary to spray hops in years when lice are on the vines or on the hops?

A. That depends on the appearance or reappearance of lice after they might have been killed. Now, you take, for instance, this year; there was yards that was sprayed as high as three times; and other yards got very good results from one spraying; where they were sprayed early.

Q. What is the recognized material, if there is one, that is used by hop men in spraying?

(Testimony of H. A. Hinkle in rebuttal.)

A. Quassia wood and whaleoil soap is the best. There has been this year, and possibly the year before, where tobacco has been used and another ingredient I am not familiar with.

Q. What is the customary habit of the hop men in spraying, as to the material that they use?

A. Whaleoil soap and quassia wood.

Q. That is generally recognized, is it?

A. As the best, yes, sir.

Q. Now, he testified that you told him that you could not handle those hops at all under any consideration. What is the fact about that?

A. I told him that I would not accept those hops under the contract as that quality of hops; that I could not possibly accept such hops on a contract.

Q. Now, what did you mean by such hops?

A. Inferior quality to what was called for in the contract; such hops as he tendered to me on that day.

Q. He has testified you told him if the hops were prime, you told him you would take them on the contract.

A. I said, if those hops were prime in quality, before we went out to inspect them, that I would take on our contract every bale that run prime, yes, sir. But there was no hops in the lot that was prime.

COURT:—What did you say about rejecting them?

A. I told him that I would have to reject the

(Testimony of H. A. Hinkle in rebuttal.)

hops because they were not of the quality stipulated in our contract.

COURT:—Did you mean by that you would reject the hops absolutely?

A. On the 31st day of October?

COURT:—Yes.

A. Yes, sir.

COURT:—Then did you have in mind the clause in the contract that permitted him to make a tender of the hops if they were not up to quality?

A. Yes, sir.

COURT:—Did you reject them absolutely notwithstanding that clause?

A. Well, he didn't make any tender to me. It is his place to make the tender, and I told him then that I was willing to arbitrate. There is a clause also in the contract that calls for arbitration.

COURT:—That is, arbitrate as to the quality?

A. Difference of opinion as to quality, yes, sir.

Q. Now, he testified that you didn't know what they were; that you told him you didn't know what they were, that they graded them at the office in Portland.

A. He asked me the grading of the samples that he had shipped to Portland. And I told—I didn't know, because I hadn't seen them, and that they had never reported to me what classification those hops were.

Q. You hadn't at that time seen them, then?

(Testimony of H. A. Hinkle in rebuttal.)

A. Not at the time he asked me the question. That was before I had been out there the first time.

Q. Now, did you tell him that you could not grade the hops, that they graded them down here?

A. No, sir, I did not. I want to correct my testimony in one place. He asked me the grading on those hops the first time I was out there, what they was graded in Portland, or what the grading was on them; and I told him at that time that they graded them in Portland.

Q. That is from the first to the third?

A. Yes, sir, first to the third.

Q. Then the conversation that you had with John at that time was simply upon the two samples that you took out?

A. Yes, sir; if he had no hops better than those two samples, that I would have to reject them. And he said he thought he had some better; and it was necessary for an inspection, which I was ready and willing to do.

Q. He testified you advised him to sell to somebody else. Did you do that?

A. Not on the first trip there, I did not; no, sir.

Q. Did you afterwards?

A. I told him that there was only one thing to do; that it would be necessary for him to sell them and to get the best he could out of them.

Q. When was that?

A. It must have been on the 31st day of October,

(Testimony of H. A. Hinkle in rebuttal.)

I guess, if I made any such assertions as that. I don't know that I did; but if I did say so, it was at that time.

Q. Now, John testified that the price of hops dropped immediately after you rejected them the first time; as he put it; between that and the 31st of October, when you made the second inspection, that the price went down and then went up again.

A. I don't remember as to that; possibly might have fluctuated; possibly become a little quiet along in there; but I don't think there was very much of a change, but still there might have been a cent or so variations.

Q. He testified that immediately after the 31st of October the price dropped as low as 10 cents.

A. For what quality?

Q. He didn't say.

A. Well, there might have been a few poor grades in the state bought at 10 cents, very inferior grades—there was no good hops.

Q. How low did the price of choice hops go?

A. I don't think choice hops ever was under 15 to 16 cents; that is, up till some time after these hops were sold.

J. W. Seavey, being called in rebuttal, testified:

Q. Mr. Seavey, what is your business?

A. Hop grower and dealer.

Q. How long have you been in that business?

A. I have been growing hops all my life. I have

(Testimony of J. W. Seavey in rebuttal.)
been dealing about 20 years.

Q. Have you been growing hops any?

A. About 30 years, I guess—as long as I can remember.

Q. To what extent?

A. Started in a small way, but I am now about the largest grower in the state. I think I am the largest individual grower in the state.

Q. How much experience have you had in spraying hops?

A. Well, I guess I have sprayed hops more than any other man in the state.

Q. What is the principal season of the year to commence spraying hops?

A. Well, we figure on spraying before they bloom. Some years they are a little later than others, probably a few days; but we always figure on spraying before the hops begin to bloom; and that is along about the first of July. If you wait later you will ruin the bloom. If they get out in full bloom when you spray you will knock a great many of them off.

Q. Will that have any more effect than just to knock part of them off?

A. Well, if you spray later, after the hop is set on, it tends to affect the hops. It will—I don't know how to express it, but cause them to kind of curl up, and they will be immature. I have ruined one crop by spraying in August. There was part of our crop at Eugene sprayed too late, and they never

(Testimony of J. W. Seavey in rebuttal.)

did amount to anything. They would curl, and green, and it don't do any good to spray hops any-way after they set on. The vermin or lice get into the burrs and you can't reach them with the spray. It is money thrown away after the hops are set on.

Q. What are the principal materials for spraying hops?

A. Well, there is a good many. We have used everything in a small way, but we find quassia chips and whaleoil soap, or fish oil soap, to be the most effective. In fact, the Agricultural College, I think in 1912—we gave them an acre and they used every kind of spray that they could get hold of. And after they had finished, they told us that our spray was much more effective than theirs.

Q. About what time do the buds begin to set on the vines?

A. About the 15th of July. They bloom along about the first of July, and then the 15th, from then on they begin to change from bloom to the burr and small hops begin to set on. By the first of August you find plenty of hops as big as hazel nuts or larger.

Q. The first of August?

A. Yes.

Q. What effect would spraying have the last week in July or first week in August?

A. Well, there is a chance of injuring the crop, and I don't think it would do any good, as far as it might kill a few lice; but there is enough of them in

(Testimony of J. W. Seavey in rebuttal.)
the hops by that time to do the damage anyway; that is, we have found it that way. We have experimented every way; and we find if you can spray from the 20th of June up to the 10th of July it is more effective.

CROSS EXAMINATION

Questions by Mr. Slater.

Q. Well, Mr. Seavey, isn't there quite a difference in appearing of bloom in different yards?

A. You mean high ground or low ground?

Q. Yes.

A. No, I don't think so; not after that time of year.

Q. Or different localities?

A. No, I don't think so.

Q. And difference in time of blooming as to the kind of hops?

A. No. Well, there is a little difference. The red vine hops bloom about a week earlier than the clusters. Red vines are a little later hops, and they bloom a little earlier. They grow slow, and they bloom a little earlier.

Q. In your judgment, you might spray reasonably successfully any time before the burr appears?

A. Yes. I am going to try that next year. We are going to commence spraying the 15th of June next year. We figure spraying later helps to blight; and we are going to try earlier spraying next year on that account.

(Testimony of J. W. Seavey in rebuttal.)

Q. Well, supposing that lice didn't appear until the last week of July or the first of August, what would you do about that?

A. Well, I would not spray.

Q. You would not spray at all?

A. No, sir.

Q. You think that there might be some damage?

A. Well, I don't think it would do any good. We have experimented with it, and we find that it doesn't do any good. We would not spray at all the first of August.

Q. Could you say that any particular damage to the hops would result from spraying at that time?

A. Well, yes. I know in one of our yards in Eugene—I think it was 1912 or 1909, one of the wet years—we sprayed them late, and we never could sell them. They were green and fluffy, curly.

Q. Well, wasn't that a peculiar season on account of excessive moisture?

A. No, I don't think so. The other part of the yard that we sprayed earlier was all right.

Q. Well, now, don't you know, as a matter of fact, a great many hop raisers don't spray until the first of August?

A. No, I don't think so. There might be a few of them; but if they put it off that late they have trouble. And another thing—the lice appear before that time. The lice come in, the first crop—they come in crops—the first crop is a flying lice, and they

(Testimony of J. W. Seavey in rebuttal.)

deposit the small ones on. And they all leave by the first of July. You never can find them after the first of July. And the other lice are always there. Of course, if it comes rainy weather, weather in their favor, they will increase faster. Then the second, which hatches in September, hatches into another family of flying lice. I think they will commence about the 15th of September.

Q. That is about picking time?

A. Yes, along the last of picking time.

Q. How many times did the flying lice appear last year?

A. Twice. They appeared early and in the last of September again. But there is no flying lice could be found. I do that work; I make that a specialty as my part of the work; and I think after June the 15th it is very seldom we find any flying lice; that is, in any quantity.

Q. Didn't the lice come back again along in the latter part of July last year?

A. No, sir; not if they are sprayed.

COURT:—That is last year you want to inquire about?

MR. SLATER:—Well, I am just testing his knowledge as an expert. That is all.

RE-DIRECT EXAMINATION

Q. Where are the most of your yards, Jim?

A. Why, I have them all through the state. I have one at Eugene—I have 160 acres there; 135 in

(Testimony of J. W. Seavey in rebuttal.)

Benton county, right near Corvallis; I have 165 acres in Washington county, near Banks. That yard is up on a hill. Last year is the first year we ever sprayed that hill.

Q. You know Mr. Edmunson's yard, do you?

A. Yes, I know where it is located.

Q. Have you ever been in it?

A. Yes, a good many times.

Q. What kind of vines are those?

A. I think most of them are the cluster.

Q. There is one matter there I don't quite understand, Jim. I want to ask you for information about it. Now, the first crop of lice you say that come—

A. Yes.

Q. They deposit eggs on the vines?

A. No, they deposit small lice.

Q. Small lice?

A. Yes.

Q. Then these small lice grow in size; is that it?

A. Yes, sir.

Q. Those are the ones you have got to kill?

A. You kill those off any time from the last of June, oh, up to the first of August or the middle of July—if you get them all well killed, you need not worry; your hops will be taken care of; 1913 I commenced picking hops the 4th of September, and picked continuously till the 4th of October, and had no mold at all. It is in the spraying and the mate

(Testimony of J. W. Seavey in rebuttal.)

rial you spray with, a good deal.

Q. Now, does mold in the hops affect their market value?

A. Yes, sir. There is a great many—most important brewers, the big ones, you can't ship moldy hops to them at all.

MR. SLATER:—I think, your Honor, that is not proper rebuttal.

COURT:—I think you are getting outside of rebuttal.

Q. There is some testimony here about a sprinkling of mold in the hops. Would a sprinkling of mold in the hops affect their commercial value?

A. Well, I don't think so. A sprinkling of mold—we pass them and get through with it. What you mean by a sprinkling of mold—you cannot find a—

COURT:—I think that is part of your case in chief.

MR. SLATER:—We are not objecting, your Honor.

COURT:—The Court is not going to take up time with this. I want to get through with it.

JUROR:—How many times do you spray?

A. Twice.

JUROR:—How close together?

A. About eight days apart.

James Hayes, being called in rebuttal, testified:
Questions by Mr. Williams.

Q. Mr. Edmunson testified when he was on the

(Testimony of James Hayes, in rebuttal.

stand, that Mr. Hinkle called him off to one side under the horse shed there, somewhat mysteriously, to get him off by himself. Did you see anything of that kind?

A. Which time do you refer to?

Q. The first time you were there.

A. No, sir. The last time we was there I went to get the rig; and they walked off towards Edmunson's horse; but the first time we was together.

Ross H. Woods, being called in rebuttal, testified:
Questions by Mr. Williams.

Q. Did Mr. Heyer have anything to do with the grading of these hops?

A. No; just helping in the warehouse is all.

Q. Did he assist you any in grading them?

A. No, he did not; just helped carry the tryings out to the light, is about all; helped to weigh some of them.

Q. Now, at the time that you were talking with Mr. Edmunson there, did you know the terms of the Klaber, Wolf & Netter contract?

A. No, I did not.

Q. Did Mr. Heyer stay there all through the time that you were grading the hops?

A. I don't know that for sure. He was out and in, in the warehouse and out on the platform.

Q. Did he take an active part in inspecting the hops?

A. No, he did not.

(Testimony of Ross H. Woods, in rebuttal.)

Q. Whom was he working for at the time?

A. H. L. Hart.

Q. And working with you?

A. Yes.

Hal V. Bolam, being called in rebuttal, testified:
Questions by Mr. Williams.

Q. Mr. Bolam, have you any information in regard to the way the hop dealers and hop buyers treat a chemical analysis of hops?

A. I never heard of them referring to it at all, Mr. Williams. Hops, as far as my knowledge goes in the business, are never bought or sold by chemical analysis.

MR. SLATER:—I don't think that is material, your Honor.

COURT:—I think I will hear the testimony in view of the testimony of Mr. Pilkington.

Q. Do they ever pay any attention to chemical analysis in buying and selling hops?

A. Not to my knowledge, Mr. Williams. They buy on sample only; sample and inspected in the customary way. That is the way dealers buy from growers and brewers from dealers.

Q. What are the general markets of the world in buying hops and selling them?

A. Well, you mean that buy from dealers here?

Q. Yes. Where are the hops sold?

A. Well, a good many are sold, of course, in the United States.

(Testimony of Hal V. Bolam, in rebuttal.)

Q. What places in the United States?

A. Chicago, New York, Cincinnati, St. Louis, and Milwaukee.

Q. Have you had dealings in all of those markets?

A. No, no direct dealings. Simply I have shipped hops, when I was with Mr. Livesley I have shipped hops to brewers in those centers. I have shipped a great many hops to London, my native town.

Q. In any of those places that you have had connection with or shipped hops to, do they pay any attention to chemical analysis?

A. Not that I know of; certainly not between ourselves and them.

Max Wolf, being called in rebuttal, testified:
Questions by Mr. Williams.

Q. Mr. Wolf, how long have you been in the hop business?

A. Over 35 years.

Q. Where?

A. San Francisco, Portland, Oregon, and Washington.

Q. You have been buying and selling hops all those years?

A. Yes, sir.

Q. Has that been your constant business?

A. Yes, sir.

Q. To what extent have you been dealing an-

(Testimony of Max Wolf, in rebuttal.)

nually in hops?

A. What do you mean, to what extent? More or less extent—quite largely at times.

Q. How many hops, on an average, do you buy annually?

A. Oh, I never figured that, figured it out.

Q. Do you remember how many you bought in the year 1912?

A. I made no—twenty-five or thirty thousand bales, figured in the rough.

Q. Would that be about an average year?

A. Oh, I could not say. I never figured it specially.

Q. You may state whether or not at any time during your business in the hop industry, the persons to whom you have sold hops have ever paid any attention to a chemical analysis of hops.

A. They never demanded anything of that sort from us. You mean the parties to whom I sold?

Q. Yes.

A. Never required it.

Q. Have the brewers ever bought on a chemical analysis?

A. Bought from growers?

Q. Yes.

A. No; not to my knowledge.

Q. What markets have you sold your hops in that you have bought?

A. Markets? To Australia; England; domes-

(Testimony of Max Wolf, in rebuttal.)

tic markets; some to South America, different points.

Wherever there are brewers, our hops have gone.

Q. Sold them in New York?

A. Lots of them.

Q. Chicago?

A. Yes.

Q. All the markets of the United States?

A. Nearly all of the markets, I should say—they have found their way there, the hops we have sold.

Q. Do you know whether or not the brewers have ever been able to determine by chemical analysis the exact principle in hops that make the good beer, or make beer?

A. Whether the brewers have?

Q. Yes.

A. Not to my knowledge. I don't believe they have bothered much about the chemical analysis of hops. They depended on the dealers mainly.

Q. Do you know what the essential element of the hop is that makes the beer?

A. What makes the beer?

Q. Yes.

A. Well, it is the tannin in the hops; the essential oils and the soft resins. They are the principles of the hops in general.

INSTRUCTIONS

Gentlemen of the Jury:

Note One, preliminary explanation omitted.

The plaintiff, Max Wolf, sues individually. The contract was made, however, with the firm of Klaber, Wolf & Netter. The firm was composed of Wolf and Netter, but it took the firm name of Klaber, Wolf & Netter. Since the contract was drawn and some of the dealings were had with reference to an inspection of the hops and a delivery thereof, one of the firm has died, leaving now but one of that firm, namely, Wolf himself, who is suing as the surviving member of the firm.

Evidence has been offered here, by way of a transcript of record of the Probate Court in California, to show that Netter has died, and that since his death the estate has gone so far as that the administrator has assigned to Wolf what interest Netter, or the estate of Netter, had in the firm. But Wolf is now suing as the survivor of the firm, and I will instruct you, gentlemen of the jury, under the testimony in this case and under the pleadings as amended, that Wolf has a standing in court to sue in that right, that is, as the survivor of the firm; and he is suing really in behalf of the firm, and whatever is recovered, if anything at all, would be the funds of the firm, but Wolf would have a right to recover it under this form of complaint.

Now, gentlemen of the jury, the complaint states,

in effect, briefly as I shall give it to you, that on the 29th day of May, 1912, the firm entered into a contract with the defendants, whereby the defendants agreed to produce 30,000 pounds of hops, net weight, of the crop to be grown in the year 1912 by the defendants upon the farm owned by Mrs. Edmunson. It is further alleged that the defendants agreed to cultivate, carefully spray, cleanly pick, properly dry, cure and bale, and prepare for market, all of said hops grown on the said premises, in a good and husbandlike manner; that it is provided in the contract that all of said hops were to be of first quality, that is, sound condition, good and even color, fully matured but not over-ripe, flaky, cleanly picked, properly dried and cured, free from sweepings and other foreign matter, and not affected by spraying or vermin damage, and should not be the product of a first year's planting. It is further alleged that Klaber, Wolf & Netter agreed to pay the defendants at the rate of 25 cents per pound for the hops, when delivered in accordance with the terms of the agreement; that the hops were to be delivered free from all liens or incumbrances of whatever kind and nature, on the cars or in the warehouse at Goshen, Oregon, between October 1, 1912, and October 31, 1912. It is further alleged that it was agreed that Klaber, Wolf & Netter should advance under said contract, as part payment for said hops, the sum of \$1,200.00 on or about May 31, 1912, and \$1,800.00 on or about the first of September, 1912; and it is alleged that

they did so advance the sums named. It is alleged that it was further agreed that, if in the judgment of Klaber, Wolf & Netter the quality of all or any part of the hops tendered under the said contract by said defendants, should be inferior from any cause whatever to the quality of hops specified in said agreement, it should be the duty of defendants to tender to the said Klaber, Wolf & Netter the said hops raised, and the said Klaber, Wolf & Netter might have the right of accepting the entire quantity contracted for, at a reduction in price, which reduction should be equal to the difference between the market value of said hops tendered under the contract and the market value at the time of the execution of the contract. It is further alleged that during the month of October, 1912, the said Klaber, Wolf & Netter received samples from the hops grown upon said premises during the said year 1912, and, finding them of inferior quality and not according to the specifications contained in the said contract, said Klaber, Wolf & Netter, on the 30th day of October, 1912, inspected the hops fully and completely, and found them slack dried, bad and uneven in color, of unsound condition, not fully matured, not cleanly picked, not properly dried or cured, and affected by vermin damage; whereupon the said Klaber, Wolf & Netter rejected said hops as first quality hops as defined by the contract, and said defendants refused to tender the said hops to said Klaber, Wolf & Netter at any reduction in price,

but refused to act any further under the said contract or comply with any of the terms or provisions thereof, and said defendants, without the knowledge or consent of Klaber, Wolf & Netter, proceeded to and did sell the said hops to other parties, in violation of their contract.

(General instructions on preponderance of evidence omitted.)

Now, most of these allegations in this complaint are admitted by the defendants. All of paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the complaint are admitted; so by keeping that in mind, you will have no trouble in determining whether they are proven, because the admission means proof. As to paragraph 10 of the amended complaint, "These defendants deny that during the month of October, 1912, the said Klaber, Wolf & Netter received samples of the hops grown upon said premises during the said year 1912, and finding them of inferior quality or not of the specifications contained in said contract, said Klaber, Wolf & Netter on the 30th day of October, 1912, inspected the hops fully or completely, or found them slack dried, or at all, or uneven in color, or of unsound condition, or not fully matured, or not cleanly picked, or not properly dried or cured, or affected by vermin damage." So that as to paragraph 10, that is in effect denied in whole, and that forms the issue as to that paragraph for you to determine whether the plaintiff is right in the allegations of the complaint, or whether the defendants' denial is

right, and hence that forms the principal grounds for your consideration.

Then it is further alleged, by way of admission, in this wise: "These defendants admit that the said Klaber, Wolf & Netter, through their representative, rejected said hops, and deny that the reason for the same was that they were not first quality hops as defined by that contract, and these defendants deny that they refused to tender the said hops to the said Klaber, Wolf & Netter, at any reduction in price or refused to go any further under the said contract, or to comply with any of the terms and conditions thereof, or that said defendants, without the knowledge or consent of said Klaber, Wolf & Netter, proceeded to and did sell the said hops to other parties in violation of their said contract, or otherwise, except as hereinafter alleged." They allege what they did with the hops thereafter. So that there is a denial that far, and what we term in law an avoidance. After having denied these things, the defendants set up what they did concerning the hops, and in that way it is sought to avoid the effect of the allegations of the complaint. Now, there is affirmative matter set forth in the part of the answer controverts the plaintiff's allegations. I will not read that affirmative matter to you, because it is repeated in a further and separate answer, which I will call to your attention now.

It is alleged on the part of the defendants, as a further and separate answer to this complaint, that

they did enter into the contract as alleged, and they set forth a copy of the contract as "Exhibit A" to the answer, and that copy of the contract will be for your inspection when you retire to the jury room. Then it is alleged that the defendants produced, for the year 1912, 40,000 pounds of hops, all of which were picked, dried and baled according to the terms of the contract, and stored in the warehouse at Goshen on and between the first and 31st days of October, 1912, and that the defendants tendered said hops to said partnership on and between said dates, at said place. And defendants allege that said hops contained more than 30,000 pounds of the quality described in the contract; that the partnership pretended to inspect and examine said hops on or about the 3rd day of October, 1912, but they inspected only two bales thereof, and did not examine any of the rest of said hops in said warehouse, and at that time the said partnership notified the defendants that they had rejected the hops, and would not take them under any condition whatever, and requested the defendants to sell said hops to other parties; and thereupon said partnership, without any right and against the terms of said contract, demanded of the defendants the repayment of the advance made for the cultivation and picking of said hops. Then it is further alleged that the partnership made no further inspection of the hops until about the 31st day of October, 1912, when the partnership, not acting in good faith but merely pretending to inspect said hops,

examined the same, and wrongfully notified the defendants that they rejected all of the hops so grown by the defendants, and notified defendants that they would not take them under any conditions whatsoever, and again demanded of the defendants the repayment of the said advances. Then it is further alleged that the defendants complied with all the terms and conditions of the contract, and that the said purchasers never at any time acted in good faith in the inspection and examination of the hops, but at all times intended to, and did abandon their said contract, for the sole reason that the market price of hops at the time of said tender and inspection was about 16 cents per pound for the quality of hops described in the contract, whereas the contract price agreed to be paid was 25 cents per pound; and the defendants allege that they had enough hops of said crop of the quality required under the contract to fulfill the terms thereof, and that the defendants were at all times ready, able and willing to deliver said hops to said purchasers, and were willing to do so at any time during the life of the contract, if the purchasers had not refused to take said hops, and referring to the allegations in the complaint that the defendants sold the hops and shipped them out of the state of Oregon, defendants allege that the hops were not sold until March, 1913, and were held in said warehouse until that time, without any incumbrance whatsoever except as the said purchasers might have claimed, as they at all times well knew.

Then it is alleged that on the 12th day of March, the defendants were compelled to and did sell the hops at an average price of 12 cents per pound, which was the reasonable market value of said hops in Lane county at that time, and that by reason thereof the defendants suffered a loss amounting to \$3,900.00, all of which was caused on account of the said purchasers not complying with their contract. Now, this sum of \$3,900.00 the defendants ask judgment for; or, in other words, they ask that whatever claim or demand the plaintiff has for the advances made.

(Preliminary instruction as to abatement omitted.)

Now, I will say in this relation that, as to the affirmative matter contained in these further and separate answers, the burden devolves upon the defendants, before they can recover, to establish their allegations in that respect by a preponderance of the evidence, as the plaintiff is required to establish his affirmative allegations by a preponderance of the evidence.

Now, this brings me to the contract, which I will explain to you so that you may understand what is meant by certain clauses thereof. The contract, as I have said, or a copy of it, is attached to the answer and marked "Exhibit A." In this contract the parties, J. M. Edmunson and Mrs. M. J. Edmunson, are described as the buyer, and so the contract treats them as seller and buyer. The contract first sets out

that, for the consideration of one dollar to be paid to the seller by the buyer at the time of the execution of the agreement, and the further covenants and agreements therein contained on the part of the parties to the agreement,—that constitutes the consideration upon which the contract was entered into. Now, as to the sale, the seller has bargained and agreed to sell, and the buyer has bargained and agreed to purchase, 30,000 pounds, net weight, of the crop of hops of the growth of 1912. Then as to the description of the realty, that is set out; that is to say, the contract states where the hops shall be grown, but that is not a material matter in this complaint, because all matters with relation to the place where the hops were grown are admitted, and indeed the matter is admitted that more than 30,000 pounds of hops were grown upon the place. Now, as to the quality:

“The said seller hereby agrees to cultivate, carefully spray, cleanly pick, properly dry, cure and bale and prepare for market all of the said hops grown on the above described property, in a good and husbandlike manner. (The said hops covered by this instrument shall be of first quality, i. e., of sound condition, good and even color, fully matured, but not over-ripe, flaky, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter, and not affected by spraying or vermin damage. Said hops shall not be the product of a first year’s planting.)”

Then there are other conditions in the contract, as to baling and tare, and then we come to the price:

“The said buyer hereby agrees to pay to the said seller at the rate of twenty-five cents per pound for the hops above sold when delivered in accordance with the specific terms of this agreement.”

Then as to advances: The buyer agrees to advance to the seller, as part payment under the contract, upon ten days' request therefor in writing, the following sums—\$1,200.00 on or about May 31, 1912. and \$1,800.00 on or about September 1, 1912, as actually required for picking purposes.

Then as to inspection:

“The said buyer shall have the privilege of inspecting all of the said hops grown by the said seller upon the above described property, either on the farm of the said seller or at any place the said hops may be stored or located, and selecting therefrom the quantity sold under this contract.”

(Explanation as to delivery, interest, inferior quality, omitted.)

(Instruction as to the clause on tender of the hops and insufficient quantity and general explanation. omitted.)

Now, the defendants having admitted that the advances of \$3,000.00 were made under the contract, the plaintiff would be entitled to recover that sum back, unless the defendants have complied with their part of the agreement, in producing 30,000 pounds of hops of the quality stipulated to be produced, and

were at the time stipulated for delivery ready and willing to deliver same to the plaintiff; or, if the hops were not up to the stipulated standard in quality, that is, were not of first quality, then unless defendants made tender of the 30,000 pounds under the "Inferior Quality" clause of the agreement, and still stand ready in either event to make such delivery, unless excused from making delivery now by the act of the plaintiff as set forth in the first of the separate affirmative answers of the defendants.

I will explain to you what is required of the defendants to produce as to quality. It is set out in that clause that the hops covered by the contract shall be first quality. Then it sets out further what is meant by first quality; that is to say, they shall be of sound condition, good and even color, fully matured but not over-ripe, flaky, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter, and not affected by spraying or vermin damage.

Now, gentlemen of the jury, there has been considerable testimony here as to whether these hops were, under this clause of the contract, of first quality. You remember that they have been described in their different qualities as choice, prime and medium. Now, "first quality hops" means simply that the quality shall be substantially as described here, and as has been conditioned as to the quality of hops to be produced. It is not necessary that the defendants show that the hops are of exact quality as here

described, but they must be of substantial quality as herein described. It is almost impossible in the sale of products of the kind—you may take barley and oats, for instance, and if they are sold to be of first quality, it is sufficient if they come up to a substantial condition as described, or as stipulated that the quality shall be. Now, it is said here that they should be of sound condition, good and even color, fully matured, etc. Several conditions are therein set out. Now, all of these must be substantially made out; that is to say, they must be substantially of sound condition, and substantially of good and even color, and fully matured, substantially so, but not over-ripe, and substantially flaky, cleanly picked, etc. So you shall put all of these conditions together, and in the end determine whether or not, considering all, the hops come up substantially to first quality.

As to this, in this connection, I will instruct you “that the contract at issue in this case defines the particular qualities of the hops necessary to constitute hops of first quality, and to determine from the evidence introduced in this case, whether the hops raised and tendered by the defendants are of the prescribed quality, you will consider only the elements named in the contract, namely,—of sound condition, good and even color, fully matured but not over-ripe, flaky, cleanly picked, properly dried and cured and free from sweepings and other foreign matter, and not affected by spraying or vermin damage; and in

considering the evidence adduced pertaining to these qualities, you are not bound to find a strict or literal compliance with these qualities, but if you find from a preponderance of the evidence that the hops so tendered possessed substantially the qualities named in the contract, then you would be authorized to find that the hops complied with the terms of the contract. And I further instruct you that a designation of a particular quality, as good color or sound condition, does not mean that the color shall be the best possible color, or that sound condition means the best possible condition, but such designations mean only that they shall be of a merchantable quality according to the custom of the hop trade, and that the hops in those respects shall be suitable for the purpose for which they were intended; good as to quality does not imply and absolute quality as the best, but that the article shall be good of its kind."

I will state further, in this connection, gentlemen of the jury, that these hops were raised for the market, and the contract was made with the market value in view, and, in considering the quality of these hops, you will consider them as merchantable, as the parties themselves desired that the hops should be sold in the market and should be so treated, so that the merchantable value is the thing you are to consider, and not, strictly speaking, the real inherent or chemical value.

I will instruct you further: "There is testimony

in this case tending to show that hops have a commercial value corresponding to the grade which they occupy, and are bought and sold on that basis. I have used the word 'substantially' in connection with the quality of the hops, that is, that the hops must be substantially of the quality defined in the contract. If the hops contained any of the defects mentioned in the contract so as to reduce the market grade thereof and so as to reduce the market price, then the hops would not be substantially of the quality defined in the contract."

The defendants were required to produce 30,000 pounds of hops. There is no dispute, I might say, as to the quantity produced. It is practically admitted that the defendants produced about 40,000 pounds of hops. But the real issue centers about the quality. In this relation, there is a dispute as to what was done. The defendants claim that the plaintiff, after inspection, declared the hops to be not up to the quality stipulated for, and thereupon rejected the hops absolutely and demanded repayment of the money advanced. If plaintiff did this, he would not be entitled to insist upon the defendants making tender of the hops as inferior in quality in pursuance of what is styled the "Inferior Quality" clause of the agreement, because by his conduct he would have waived performance in that respect upon the part of the defendants.

(Instruction as to tender omitted.)

The defendants, however, claim they had 30,000

pounds of hops ready for delivery of the quality substantially as stipulated for, which claim is disputed, and this makes it incumbent upon you to ascertain whether the hops were in quality up to the contract. If they were, then plaintiff was required to take them, and to pay the balance due at the rate of 25 cents per pound; that is, if there were 30,000 pounds of hops of the stipulated quality. He was not required to take less than that amount. If the defendants tendered less than the quantity of hops contracted for, then it was defendants' duty to tender all the hops raised, if less than the amount contracted for, that is, less than the 30,000 pounds, so that plaintiff would in that event have been entitled to damages as stipulated for under the "Insufficient Quantity" clause. But there is no claim that the contract has been breached in this respect, that is, as to the quantity produced, and you need not give that particular phase of the contract further consideration. At any rate, the plaintiff was not bound to accept less than the stipulated amount of hops agreed to be produced, or hops of a quality inferior to the quality stipulated for; and if the hops produced were either short in quantity or below the stipulated standard in quality, the plaintiff was entitled to reject them, and, if he did so, would be now entitled to recover.

If, however, the hops were up to the stipulation of the contract in quantity and quality, then the plaintiff was required to take them and a refusal

to accept was a breach of the contract on his part. and he would still be liable for the full amount of the purchase price at 25 cents per pound, less the \$3,000 advanced, if the defendants were still in a position to deliver the hops, or have been excused by the act of plaintiff from now making delivery, as they claim that they are excused under the further and separate answer.

This brings us to the defense interposed to plaintiff's complaint, which is that defendants produced hops in quantity and quality in accordance with their agreement; that plaintiff pretended to inspect them, but did not act in good faith, and so acting in bad faith because hops had dropped in the market below the contract price, plaintiff notified defendants that he rejected all such hops, and would not take them under any conditions, and demanded repayment of the money advanced; that defendants had enough hops of said crop of quality required under the contract to fulfill the terms thereof, and were at all times ready, able and willing to deliver them to the purchasers at any time during the life of the contract, if the purchasers had not refused to take them, and that, having held them until about March 12, 1913, they were compelled to and did sell them at an average price of about 12 cents per pound, by reason whereof they suffered a loss of \$3,900.00.

Now, the defendants were not required to hold the hops indefinitely for plaintiff after rejection by plaintiff and notification that he would not take them,

exceptions and order that the same be filed and spread of record in the cause as of the date of the judgment.

Dated July 29, 1916.

CHARLES E. WOLVERTON,
United States District Judge, District of Oregon.